(27,239)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 484.

POSTAL TELEGRAPH-CABLE COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF FREMONT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1 No. 20419.

CITY OF FREMONT

v.

POSTAL TELEGRAPH-CABLE CO.

Postal.

Pleas Before the Supreme Court of the State of Nebraska, at a Term Thereof Begun and Holden at the Capitol, in the City of Lincoln, in said State, on the 6th Day of January, 1919.

Present:
Hon. Andrew M. Morrissey, Chief Justice.
Hon. Charles B. Letton, Judge.
Hon. Samuel H. Sedgwick.
Hon. William B. Rose, Judge.
Hon. Chester H. Aldrich, Judge.
Hon. Albert J. Cornish, Judge.
Hon. James R. Dean, Judge.

Attest:
H. C. LINDSAY,
Clerk.

Be it remembered, That on the 27th day of November, 1917, there was filed in the office of the Clerk of said Supreme Court a certain Præcipe, in the words and figures following, to wit:

2 In the Supreme Court of the State of Nebraska.

CITY OF FREMONT, NEBRASKA, Plaintiff and Appellee,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, a Corporation, Defendant and Appellant.

Præcipe on Appeal.

1. The Court from which this appeal is taken is the District Court of Dodge County, Nebraska.

2. The judgment appealed from was rendered on the 21st day of September, 1917.

3. The names of the parties and their relation to the cause in the Court below are: City of Fremont, Nebraska, Plaintiff; and Postal Telegraph-Cable Company, a corporation, Defendant.

4. The party appealing is Postal Telegraph-Cable Company, a corporation, Defendant in the Court below, and City of Fremont, Nebraska, Plaintiff in the Court below, is the appellee herein.

DYSART & DYSART,
Att'ys for Defendant and Appellant.

Endorsed: #20419. City of Fremont v. Postal Telegraph-Cable Co. Praecipe. Supreme Court of Nebraska. Filed Nov. 27, 1917. H. C. Lindsay, Clerk.

3 And now on this same date, to-wit, November 27, 1917, there was filed in the office of the Clerk of said Supreme Court of Nebraska, a certain transcript in words and figures following, to-wit:

4 Pleas Before the District Court of the Sixth Judicial District of Nebraska, in and for the County of Dodge, at a Term Thereof Begun and Holden in the City of Fremont, in said County and State, on the 13th day of December, One Thousand Nine Hundred and Sixteen.

Present, Honorable Frederic W. Button, Judge; Duke Mundy, Clerk.

Be it remembered, that heretofore, to-wit, on the 13th day of December, 1916, a petition was filed in the office of the Clerk of said Court in the words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, NEBRASKA, Plaintiff,

VS.

POSTAL TELEGRAPH-CABLE COMPANY, a Corporation, Defendant.

Petition.

Comes now plaintiff and complains of defendant and alleges:

1. That the plaintiff is and during all of the times hereinafter mentioned was a municipal corporation duly organized and existing under and by virtue of the laws of the State of Nebraska, as set out in Chapter 49 of the Revised Statutes of Nebraska, 1913, under the corporate name of the City of Fremont and a city of first class thereunder, having more than 5000 and less than 25,000 inhabitants.

2. That defendant is and during all the period hereinafter mentioned was a corporation duly organized and existing and acting

as such under the corporate name and style of the Postal
5 Telegraph-Cable Company, and carrying on business in Dodge and other Nebraska counties, and in the City of Fremont.

3. That heretofore, to-wit: since long prior to the year 1903 and continuously ever since there was and now is conducted and carried on within the territorial and corporate limits of said City of Fremont, plaintiff herein, the business and occupation of receiving messages in said City from persons in said city and transmitting the same by telegraph from said City and within this State to persons and places within this State, and of receiving in said City messages by telegraph transmitted within this State from persons and places within this State to persons in said City and delivering the same to persons in said City, not including the receipt, transmission, or delivery of any messages to or from any department, agency, or agent of the United States, and not including the receipt, transmission or delivery of any message which is interstate commerce, which business and occupation is one of great profit to the persons and corporations engaged therein and carrying the same on in said city.

4. That heretofore, to-wit: Prior to October 1, 1903, the plaintiff by its duly constituted authorities and in the manner provided by law, duly passed and adopted an ordinance, which ordinance was duly approved by the Mayor of the plaintiff and published as required by law and was in force and effect on the 27th day of October, 1903, and has ever since continuously been and now is in full force and effect; and which ordinance was again re-enacted, approved and published about January 29th, 1907, in a revision ordinance embracing all the ordinances of said city, by which said ordinance and revision ordinance a license tax of $30.00 per year was duly levied upon the aforesaid business and occupation and it became and was the duty of each and every person and corporation engaged in and carrying on the aforesaid business and occupation within the corporate and territorial limits of said City to pay said license
tax. A true copy of said ordinance is hereto attached marked
6 "Exhibit A" and is hereby made a part hereof.

4½. That heretofore, to-wit, in December, 1881, the plaintiff, by its duly constituted authorities and in the manner provided by law, duly passed and adopted an ordinance authorizing the use of the streets of the City of Fremont for the erection of Telephone and telegraph lines, which ordinance was duly approved by the mayor of the plaintiff and published as required by law, and continued thereafter in force and effect, and has ever since continued in force and effect, and was in full force and effect on October 27, 1903; and which ordinance was by said City again re-enacted, approved, and published about January 29, 1907, in a revision ordinance embracing all of the ordinances of said city; a true copy of said ordinance is hereto attached, marked "Exhibit B", and is hereby made a part hereof.

5. That on or about October 27, 1903, the Postal Telegraph Cable Company applied to the Mayor and Council of the City of Fremont, Nebraska, for the right, privilege and authority to string its wires and maintain and operate lines of telegraph, including all poles and guys, cables, wires and fixtures therein along and over certain streets of the City of Fremont, Nebraska, and promised and agreed to abide by and observe all ordinances of the City of Fremont, Nebraska, then in force or that might thereafter be adopted; that the Mayor and Council on or about October 30, 1903, granted to said company, its successors and assigns the privileges aforesaid, for a period of twenty-five years, subject to the ordinances of the City of Fremont then in force and that might thereafter be adopted, and subject to other conditions and limitations in said grant set forth. That said company accepted said privileges and in pursuance of said grant constructed its poles, wires, guys, cables, and fixtures along and on the streets and alleys of said city and has ever since maintained and operated the same, and transacted business in said city, and said city has supervised and inspected the poles, wires and other property of said company occupying its streets and alleys. That prior to the application and grant herein referred to said company had no property or office in said city and no rights to use or occupy the streets and alleys of said city, and now occupies the streets and alleys of said city solely by reason of said grant.

6. That continuously ever since October, 1903, the said defendant was and now is engaged in carrying on within the corporate and territorial limits of said City aforesaid the business and occupation set forth and specified in paragraph designated, No. 2 of Section 311 aforesaid of said ordinance, copy of which marked "Exhibit A" is hereto attached and made a part hereof and said defendant, being permanently engaged in said business and occupation and intending then and thenceforth to permanently so carry on the same as aforesaid during the twenty-five years aforesaid.

7. That under and by virtue of said ordinance and the premises aforesaid there was due the plaintiff from said defendant on the 27th day of April, 1915, the sum of $60.00, and on the 27th day of April, 1916, the sum of $60.00, in addition thereto, being the said license tax for ensuing year thereof, no part of which has been paid. That said company paid this occupation tax under said ordinance for the years from 1903 to 1914, each inclusive.

8. That after the said 27th day of April, 1915, and before the beginning of this action, to-wit:—about the 30th day of April, 1915, and many times thereafter and also about the 27th day of April, 1916, and many times thereafter, the Treasurer of plaintiff duly demanded of and from said defendant the payment of said license tax in the sum of $60.00 up to April 25, 1916, and thereafter $120.00 as aforesaid and said defendant refused to pay the same and thereupon the said Treasurer duly made report on or about the above named dates of demand to the City Attorney and to the Mayor and Council of plaintiff, and prior to the begin-

ning of this action, that he, said Treasurer, deemed himself unable to collect said license tax from said defendant.

9. That thereafter on the 28th day of August, 1915, the City Attorney of aforesaid City was duly authorized and directed by the Mayor and Council of the City of Fremont to institute this action for recovery as herein set out and was so ordered to proceed.

10. That there is now due and payable to the plaintiff from said defendant under and by virtue of said ordinance and the premises aforesaid, the sum of $120.00 and interest on $30.00 from the 27th day of April, 1915, and interest on $30.00 from the 27th day of April, 1916, at seven per cent, no part of which has been paid.

11. That besides the business and occupation aforesaid and in addition thereto the said defendant was and has since continuously been engaged in the business of sending and receiving messages by telegraph which are interstate commerce in said city and said defendant had heretofore duly accepted the terms of the act of Congress passed in the year 1920, relating to telegraphs and telegraph companies and was and is entitled to all the benefits of said act and has telegraph lines extending throughout the several States of the United States, and to and from and among said several States all of which said lines said defendant operates and operated during all the aforesaid time by the transmission on and by said means of said telegraph lines, telegraph messages; that for and during the several years herein mentioned under the laws of this State there has been assessed and defendant has paid property tax on the lines, poles, instruments, realty and office furniture and stationary supplies that said defendant owns and has located and kept within the State of Nebraska which tax on said articles thus paid is and was imposed and collected under and
9 by virtue of Sections 6365, 6367 and 6368 of the Revised Statutes of Nebraska, 1913, being specific Sections 78, 79 and 80 of Chapter 69 thereof relating to revenue.

Wherefore, plaintiff prays judgment against said defendant for the sum of $120.00 and interest on $30.00 at 7 per cent from the 27th day of April, 1915, and interest on $30.00 at 7 per cent from the 27th day of April, 1916, together with costs of this suit.

C. E. ABBOTT,
Attorney for Plaintiff.

STATE OF NEBRASKA,
Dodge County, ss:

Geo. A. Murrell being first duly sworn upon his oath, deposes and says:

That he is the Mayor of plaintiff in this action; that said plaintiff is a corporation, that he verily believes the facts stated in the foregoing petition to be true.

GEO. A. MURRELL.

Subscribed in my presence and sworn to before me this 13th day of December 1916.

EDWARD J. ROBINS,
Notary Public.

[SEAL.]

EXHIBIT A.

Chapter Nine.

Taxation.

Article I. Occupation Tax.

Section 311. Levied.—That there is hereby levied a license tax on each and every occupation and business within the limits of this city, in this section enumerated to raise revenue thereby in the several different sums on the several different businesses and
10 occupations respectively as follows:

Telegraph Offices.—The sum of sixty dollars per year on the business and occupation of receiving messages in this city from persons in this city and transmitting the same by telegraph from this city within this state to persons and places within this state, and receiving in this city messages by telegraph transmitted within this state from persons and places within this state to persons within this city and delivering the same to persons in this city, excepting the receipt, transmission and delivery of such messages, to and from any department, agency or agent of the United States, and excepting the receipt, transmission and delivery of any such messages which are interstate commerce; the business and occupation of receiving, transmitting and delivering of the messages herein excepted is not taxed hereby.

Telephone.—The sum of sixty dollars per year on the business and occupation of transmitting messages and conversation by means of telephones between persons and places in this City, and receiving and transmitting messages and conversations by means of telephones from persons in this City to persons and places within this state.

Express.—The sum of sixty dollars per year on the business and occupation of receiving packages or goods in this city from persons in this city destined to persons and places within this state and conveying the same within this state to persons and places within this state and receiving in this city packages and goods destined to this city conveyed within this state from persons and places within this state, and delivering the same to persons in this city.

Saloon.—The sum of four hundred dollars per year on each saloon selling intoxicating liquor and on each dealer in intoxicating liquors whether wholesale or retail not conducting a saloon, except druggists.

11 Billiard and Pool Tables.—The sum of ten dollars per year on the business of keeping a billiard or pool table and charging persons for playing thereon, and every person having more than one such table the sum of five dollars in addition to the above for each additional table per year.

Wholesale Kerosene, etc.—The sum of twenty-five dollars per year on the business and occupation of selling at wholesale any kero-

sene, gasoline or any other liquid oil or gaseous fluid for illumination or other purposes.

Hawkers and Peddlers.—The sum of five dollars per day on each hawker and on each peddler of goods at retail, by sample, or by taking orders or otherwise; this does not include commercial travelers selling to dealers only. And for the purpose of this article any person, persons, firm or corporation, who shall upon any street, avenue, sidewalk or alley, or from any stand or vehicle within said city expose or offer or cry for sale any goods, wares, merchandise or articles of any kind shall be taken and deemed to be a hawker; and any person traveling from house to house or from place to place in the City of Fremont, Nebraska, exposing and offering for sale, lease, barter or exchange at retail, by sample, by taking orders or otherwise, any goods, wares, merchandise, or any article of any kind shall be deemed to be a peddler.

Beer Vault.—The sum of twenty-five dollars per year on the business and occupation of maintaining and keeping a beer vault.

Itinerant Physician.—On each itinerant physician or surgeon, $25 per day.

Itinerant Dentist.—On each itinerant dentist, $25 per day.

Photograph Wagons, etc.—On each photograph wagon, tent or car, $5 per day.

Auctioneer.—On each auctioneer, $5.00 per day.

12 Cane Racks, etc.—On each cane rack, knife board, baby rack, electric battery, striking machine, or any other game or device carried on in said city, $5 per day, $25 per year.

Itinerant Vendor.—On each itinerant vendor of fruits, potatoes, vegetables, flowers, groceries, hay, straw, grain, or other kinds of goods not herein specified, which is shipped in car load or wagon load lots or less, $5 per day; this does not include farmers selling products of their own raising.

Opticians, etc., Specialist.—On each itinerant optician, oculist, aurist, or other specialist, $5 per day.

Magazine and Book Agent.—On each itinerant magazine or book agent, $10 per month, $1.50 per day.

Enlarging Pictures.—On each canvasser or solicitor for pictures or for enlarging pictures, $5 per day.

Clairvoyant, etc.—On each clairvoyant, phrenologist or mind reader, $5 per day.

Phonographs, etc.—On each phonograph, stereopticon, peep show, or Punch and Judy show, $2 per day.

Horse Trader.—On each transient horse trader $5 per day, $20 per week.

Pawnbroker.—On each pawnbroker $15 per year.

Fortune Teller.—Palmist.—On each itinerant fortune teller or palmist, $2 per day.

Installment Business, etc.—On each merchant doing installment, lease or rental business, $10 per month for each solicitor or canvasser (whether owner or employee).

Street Musician.—On each street musician, $1 per day.

Bowling Alleys.—On each bowling alley, $5 per month, $50 per year.

13 Shooting Galleries.—On each shooting gallery, $5 per month, $50 per year.

Merry-go-round.—On each merry-go-round or revolving swing operated by steam, $5 per day; operated by man or horse power, $3 per day.

Circus, etc.—On each circus or circus and menagerie with more than one ring, $50 per day; one ring where the admission exceeds twenty-five cents, $50 per day; one ring where the admission does not exceed twenty-five cents, $25 per day; menagerie $15 per day; wild west show $50 per day; side show, panorama, concert, or minstrel entertainment with circus $10 per day; under cover of canvas $10 per day; all other entertainments of like nature $10 per day; circus parades, wild west parade or menagerie parade, $50 per day; provided, that circuses or circuses and menagerie or wild west show paying the occupation tax hereinbefore mentioned shall not be liable for the parade tax.

Showing under Canvas.—On each theatrical troupe showing under canvas, $5 per day.

Transient Dealers.—Twenty-five dollars per day on transient dealers; and for the purpose of this article any person, company or corporation who shall bring or cause to be brought into the City of Fremont, and sell or offer for sale, by piece, parcel or bulk any specific stock of goods, wares, or merchandise, or bankrupt or damaged goods, or stocks of merchandise, shall be deemed and considered transient dealers.

Sec. 312. Excluded Interstate Business.—The license tax by this article levied is not levied upon any business or occupation which is interstate, or which is done or conducted by any department of the government of United States, or of this state, or any officer of the United States or of this state in the course of his official duties, or by any county or any sub-division of this state, or its officers as such.

14 Sec. 313. When Payable.—On all occupations and business on which said tax is levied at a yearly rate the year for such tax shall be deemed to begin on the last Tuesday of April of each year, and shall end on the last Tuesday of April in the year following,

and the said tax for that year shall be due and payable in advance on the last Tuesday of April. Provided, that when the occupation or business begins after the last Tuesday in April, then the tax shall be payable in advance immediately before the business begins, and shall unless otherwise provided by ordinance expire on the last Tuesday of April following date.

On occupations and business on which said tax is levied at a daily or weekly rate said tax shall be deemed payable in advance immediately before the business begins, for the whole number of days or weeks, as the case may be, for which the occupation or business is to be carried on within the taxing year; and all payments of said tax shall be made on the last Tuesday of April in each year except where in any year the business begins after the last Tuesday in April in that year.

Sec. 314. Duty to Pay.—It is hereby made the duty of every person, partnership, firm and corporation engaged in carrying on any business or occupation within the limits of this city on which a license tax is levied by this article, to pay said tax at the times provided for its payment in section 313 of this ordinance.

Sec. 315. Where Payable, Receipts.—The tax hereby levied shall be paid to the treasurer of this city, who, upon payment thereof by any person shall give a receipt properly dated and specifying the person paying the occupation, the amount, and for what time the tax is paid; said treasurer shall keep proper account of said tax.

Sec. 316. Yearly Tax, How Paid.—Saloons may be Quarterly, Fractions.—All license tax levied at a yearly rate must be paid in one payment for the whole year. License tax on saloons and liquor dealers may at their option and upon their giving to the city a proper bond with sureties to be approved by the Mayor and Council conditioned for the payment of such tax to be paid in four equal installments quarterly in advance.

And in case of weekly or daily rate each fraction of a day or week, as the case may be, shall be taken to be a week or day.

Sec. 317. Penalty.—Any person violating any of the provisions of this article shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding one hundred dollars, and be committed until such fine and costs of prosecution are paid.

STATE OF NEBRASKA,
Dodge County,
City of Fremont, ss:

I, C. R. De La Matyr City Clerk, of the City of Fremont, in Dodge County, State of Nebraska, do hereby certify that the annexed ordinance, Number 503, of said City was duly passed by the Council of said City, pursuant to the rules and regulations provided by said Council of the passage of ordinances, and was duly approved by the Mayor of said City; such passage and approval being made on the

29th day of January 1907; that the said ordinance was published in Pamphlet Form.

In Witness Whereof, I have hereunto set my hand and the seal of the said City, this 9th day of December, 1916.

C. R. DE LA MATYR,
City Clerk.

[SEAL.]

Exhibit A.

EXHIBIT "B."

Revised Ordinances.

Article X. Telegraph and Telephone Poles.

Sec. 127. Consent of Mayor and Council—Restrictions.—That any person, company or corporation is hereby authorized to erect poles and wires on the streets of the City of Fremont for the purpose of erecting and maintaining any telephone, telephones, tele-
16 graph or telegraphs upon obtaining the consent of the Mayor and Council to such use of the streets, provided, that such poles and wires be so erected as to in no manner interfere with the public use of the streets and sidewalks of said city; and provided further, that the erection of such poles and wires shall always be under the supervision and control of the committee on streets and sidewalks of said city; and provided further, that the location and height of any pole or wire, may at any time be changed by the Council.

Sec. 128. Consent, When Given—Moving Buildings.—The consent of the Mayor and Council, provided for in the first section of this article, may be given at any regular or special meeting of the Council and shall be entered upon the minutes, and such consent shall authorize the use of the streets of said city for the erection of telephone or telegraph lines, subject to such regulations as have been or may be provided by ordinance; provided, that in all cases, where any person is desirous of moving any building or buildings through the streets of said city any party owning and controlling said wires, shall, after having twenty-four hours' notice, raise up said wires high enough to enable the ready and free movement of such buildings.

Sec. 129. Kind and Location of Poles and Wires.—The poles in use by any such person, corporation or company, shall be erected as near the sidewalk as practical and the wires thereon shall be at least eighteen feet from the ground, except at the intersection or crossing of streets, where such wire shall be at least twenty feet from the ground and whenever any such wire or wires cross any street in said city, it shall cross as near as may be at right angle with the street so crossed.

Sec. 130. Right to Further Regulate, etc., Reserved.—Nothing in this article contained shall be construed to prevent said city from

17 further regulating, licensing or taxing any person, company or corporation owning, using or operating any telephone or telegraph lines within the corporate limits of said city.

Sec. 131. Penalty.—Any person, company or corporation violating any of the provisions of this article, or if any person, company or corporation shall attempt to erect, or shall erect any pole or wire on the streets of said city for the purpose of erecting telephone or telegraph lines, without first obtaining the consent of said city, as provided for in section one hundred twenty-seven of this ordinance, then in either of the above cases, the person, company or corporation so offending, shall be guilty of a misdemeanor and on conviction thereof shall be fined not less than ten nor more than fifty dollars, and stand committed until such fine is paid.

STATE OF NEBRASKA,
Dodge County,
City of Fremont, ss:

I, C. R. De La Matyr, City Clerk of the City of Fremont, in Dodge County, State of Nebraska, do hereby certify that the annexed ordinance, Number 503, of said City, was duly passed by the Council of said City, pursuant to the rules and regulations provided by said Council for the passage of ordinances, and was duly approved by the Mayor of said City; such passage and approval being made on the 29th day of January, 1907; that the said ordinance was published in Pamphlet Form on January 29th, 1907.

In witness whereof, I have hereunto set my hand and the seal of the said City, this 24th day of March, 1917.

C. R. DE LA MATYR,
City Clerk.

[SEAL.]

And afterwards, on the 7th day of May, 1917, there was filed in the office of said Clerk a certain Amended and Substituted Answer in words and figures following, to-wit:

18 In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, Plaintiff,
vs.
POSTAL TELEGRAPH-CABLE COMPANY, a Corporation, Defendant.

Amended and Substituted Answer.

Comes now the above named defendant and for answer to plaintiff's petition herein filed alleges and states:

1. Defendant denies each and every allegation contained in said petition not hereinafter specifically admitted or alleged to be true.

2. Defendant admits that it is a corporation and is engaged in carrying on the business and occupation set forth and specified in

paragraph (2) of Exhibit A., of plaintiff's petition and alleges that in addition thereto is engaged in receiving, transmitting and delivering messages to and from the departments, agents and agencies of the United States, and messages between citizens of different states which are interstate commerce, that by the terms of the charter of defendant and by the statutes of Nebraska defendant is obliged to conduct an intrastate telegraph business as well as an interstate telegraph business, and that a failure or refusal of defendant to receive and transmit intrastate messages would render its charter subject to forfeiture at the instance of the state, and subject defendant to suits for damages and for penalties for a failure or refusal to receive or transmit such intrastate messages.

3. Defendant admits that plaintiff passed the ordinance marked Exhibit A and attached to plaintiff's petition by which a license tax of sixty $(60.00) dollars a year was attempted to be levied upon
19 the business and occupation set forth in paragraph (2) of said exhibit but denies that it was the duty of this defendant to pay said purported license tax and alleges that plaintiff was without power or authority to levy said tax upon the business of this defendant; and denies that it has paid said occupation tax under said ordinance from the year 1903 to 1904 inclusive and denies that it has paid any installment of tax under said ordinance and as a recognition thereof, and alleges the facts to be that through mistake and inadvertence of the clerical force of defendant a check was sent plaintiff for the installment of tax falling due in 1914, but that said payment was not made through recognition or acknowledgment of the validity of said tax but wholly through a mistake and oversight and contrary to the intention of the defendant, that defendant paid all installments of said tax up to and including May 1, 1910, but that said payments were not made in recognition of the right of plaintiff to tax the interstate business of this defendant, and defendant has at all times denied the right of plaintiff to collect from this defendant an occupation tax that would constitute a charge, burden or restriction upon defendant's interstate business. Defendant admits that plaintiff passed ordinance marked Exhibit "B" and made a part of the petition.

4. Defendant denies that there is due plaintiff from defendant under and by virtue of said ordinance and the premises aforesaid, the sum of one hundred and twenty dollars ($120.00) and interest on sixty dollars ($60.00) from the 27th day of April 1915, and interest on sixty dollars ($60.00) from the 25th day of April 1916 at seven per cent (7%) and further denies that there is any sum due plaintiff from defendant under and by virtue of said ordinance.

5. Defendant admits and alleges the facts to be that defendant had hitherto duly accepted the terms of the Post Road Act of July 24th, 1866 and amendments and supplements thereto, and was and is entitled to all the benefits of said act, and its telegraph lines
20 connects with telegraph lines extending throughout the several states of the United States and to and from and among said several states, and interchanges telegraph business with them, and

that said defendant has been assessed and paged tax on its tangible property under the laws of the State of Nebraska.

6. Further answering the petition and as a separate and complete defense thereto, this defendant alleges that said license tax is confiscatory and prohibitive, and deprives this defendant of its property without process of law, in violation of Art. XIV of the Constitution of the United States, and is unconstitutional and void, and that the total receipts of defendant from all of its intrastate telegraph business in the State of Nebraska for the year 1914 was only $108.28, and for the year 1915 was only $83.96, and that the expense properly chargeable for such business (exclusive of income on the money invested and depreciation of plant) were $185.56 in 1914 (exclusive of said license fee) and $154.26 in 1915 (exclusive of said license fee,) and that if defendant is compelled to pay said sum of Sixty Dollars ($60.00) per annum, the loss of defendant from and under the transaction of said intrastate business would have to be made up from interstate business of defendant; in other words, interstate commerce, and that the amount of said license fee is unreasonable, confiscatory and void, and that the plaintiff incurs no expense whatsoever in inspecting the poles and wires of defendant, and is subject to no disbursements, loss or damage whatsoever by reason of the existence of defendant's poles and wires in said City of Fremont, State of Nebraska, and that said Sixty Dollars ($60.00) a year is a sum far in excess of any rental charge based upon the rental value of the space occupied by the defendant's poles and wires in said City and that the defendant pays regular advalorem taxes on it tangible property in said city, the same as other property owners, and that said license tax is not a tax, but is a fee exacted for the alleged privilege
21 of the defendant to do an interstate telegraph business, and telegraph business transacted for the United States Government under and in accordance with the Postal Road Act of Congress of July 24, 1866, and the amendments and supplements thereto, which act of Congress this dependant had duly accepted by filing its written acceptance with the Postmaster General of the United States, and that the streets, highways and roads in said city occupied by the poles, wires and equipment of the defendant are post roads and post routes, within the meaning of the said Post Road Act of Congress and that the defendant has a right to use the same under said Post Road Act of Congress and the amendments and supplements thereto, particularly the Act of Congress of March 1, 1884, and that said streets, highways and roads in said city have been and are kept up and maintained as such, and that defendant has paid the license tax fee assessed and levied by the State of Nebraska for the privilege of doing business in the State for the years aforesaid and the years set forth in plaintiff's petition.

7. Defendant further alleges, as a separate and complete defense that said license tax is a tax on interstate commerce, payable and to be paid out of interstate commerce, and is a burden upon, restriction of and an illegal interference with interstate commerce and the right and power of Congress to regulate commerce with foreign nations

and among the several states, and is in violation of the Constitution and laws of the United States.

8. Defendant further alleges as a separate and complete defense that said license tax imposed upon defendant is unconstitutional and void in that it deprives defendant of the equal protection of the laws in violation of the Constitution of the United States.

9. Defendant further alleges as a separate and complete defense that said license tax imposed upon defendant is unconstitu-
22 tional and void in that it impairs the obligation of a contract in violation of the Constitution and laws of the United States.

Wherefore defendant having fully answered plaintiff's petition prays that it may go hence without day and recover its costs herein expended.

DYSART & DYSART,
Attorneys for Defendant.

STATE OF NEBRASKA,
County of Douglas, ss:

T. B. Dysart being first duly sworn on his oath states that the above named defendant is a corporation, that he is one of the attorneys for said corporation, that he has read the above and foregoing answer and knows the contents thereof, and that the facts therein stated are true as he verily believes.

T. B. DYSART.

Subscribed in my presence and sworn to before me this 5th day of May, 1917.

BESS LEVEY,
Notary Public.

23 And afterwards, on the 8th day of September, 1917, there was filed in the office of said Clerk a certain Motion to Strike, in words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, NEBRASKA, Plaintiff,

vs.

POSTAL TELEGRAPH CABLE COMPANY, a Corporation, Defendant.

Motion to Strike.

Comes now the plaintiff in the above entitled action and moves the court:

1. To strike from the amended and substituted answer of defendant filed herein, all that part of paragraph numbered "2" commencing with and following the word "that" in line 7, for the reason that

the said allegations are redundant, immaterial and a pleading of conclusions.

2. To strike from the amended and substituted answer of defendant filed herein, lines 6 to 16 inclusive of paragraph numbered "6" for the reason that said allegations are redundant and immaterial.

J. F. ROHN AND
C. E. ABBOTT.
Attorneys for Plaintiff.

24 And afterwards, on the 14th day of September, 1917, there was filed in the office of said Clerk a Reply of Plaintiff to Amended and Substituted Answer in words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, NEBRASKA, Plaintiff,

vs.

POSTAL TELEGRAPH CABLE COMPANY, a Corporation, Defendant.

Reply of Plaintiff to Amended and Substituted Answer.

25 Comes now the plaintiff in the above entitled action and for reply to defendant's amended and substituted answer filed herein alleges and states:

1. Plaintiff denies each and every allegation contained in said amended and substituted answer except such allegations as admit allegations contained in plaintiff's petition.

2. Further replying to said amended and substituted answer, plaintiff refers to the ordinances of the City of Fremont, Exhibits A and B of the petition, which have been in full force and effect since long prior to October 27, 1903, and plaintiff refers to the contract and agreement by which the defendant acquired and acquires its rights, privileges and authority to use the streets and alleys of the City of Fremont as set forth in the petition herein, and has carried on its business therein since October 23, 1903, and plaintiff refers specifically to the facts set forth in paragraphs numbered 3, 4, 4½, 5 and 6 of said petition as a part hereof as fully as if the same were set forth herein, and plaintiff alleges that thereby defendant accepted all of the terms and conditions of said two ordinances A and B, and agreed to be bound by and observe all the provisions thereof and especially to pay said tax annually, and has carried on since October, 1903, and carries on its business in the City of Fremont solely by reason of the franchises granted it; and on account thereof, and on account of the other facts set forth herein and in said petition defendant is estopped to question the validity of or reasonableness of any provision of either of said ordinances, and is estopped to set up any alleged defense contained in its answer herein.

Wherefore plaintiff renews its prayer as set forth in its petition herein.

J. F. ROHN AND
C. E. ABBOTT,
Attorneys for Plaintiff.

STATE OF NEBRASKA,
Dodge County, ss:

J. F. Rohn, being first duly sworn, upon his oath deposes and says: That the City of Fremont, plaintiff in the above entitled action, is a municipal corporation; that this affiant is the duly appointed and acting attorney of said city, duly authorized to make this affidavit; that affiant has read the foregoing reply and believes the facts therein stated to be true.

J. F. ROHN.

Subscribed in my presence and sworn to before me this 14th day of September, 1917.

JAMES J. GLEASON,
Notary Public.

[SEAL.]

And afterwards on the 24th day of March, 1917, there was entered of record in the office of said clerk a certain Journal Entry in words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, Plaintiff,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, a Corporation, Defendant.

Journal Entry.

On this 24th day of March, 1917, this cause came on for hearing upon the oral application of the plaintiff to withdraw its demurrer to the answer filed herein which application is hereby granted and demurrer withdrawn. Said cause then came on further to be heard upon the oral application of the plaintiff to amend its petition by interlineation within 5 days; this application was granted;
27 and 10 days thereafter allowed defendant to file amended answer if it desired.

And afterwards, on the 14th day of August 1917, there was filed in the office of said Clerk a certain Journal Entry in words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, Plaintiff,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, a Corporation, Defendant.

Now on this 14th day of August, 1917, this cause came on for hearing. Plaintiff has until August 27th 1917 to file reply.

And afterwards, on the 8th day of September, 1917, there was entered of record in the office of said Clerk a certain Journal Entry in words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, Plaintiff,

vs.

POSTAL TELEGRAPH-CABLE CO., a Corporation, Defendant.

Now on this 8th day of September 1917 this cause came on for hearing, motion to strike parts of answer argued and submitted.

And afterwards, on the 13th day of September, 1917 there was entered of record in the office of said Clerk a certain Journal
28 Entry in words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, Plaintiff,

vs.

POSTAL TELEGRAPH-CABLE CO., a Corp., Defendant.

Journal Entry.

Now on this 13th day of September this cause came on for hearing, motion to strike parts of answer overruled.

Plaintiffs excepts.

29 And afterwards, on the 17th day of September 1917, there was filed in the office of said Clerk certain Objections and Exceptions in words and figures following, to-wit:

39 In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, NEBRASKA, Plaintiff,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, A Corporation, Defendant.

Objections and Exceptions.

Comes now the plaintiff in the above entitled action and *objects* and *excepts* to the reading of the deposition of Edward Reynolds on the trial of this action for the reason that the same is not certified to as the deposition of Edward Reynolds as required by law, in that the purported certificate of Richard T. Thompson, a purported notary, contains no venue, and is not a certificate in fact, and said deposition of said Edward Reynolds is, therefore, not certified to.

Comes now the plaintiff in the above entitled action and objects and excepts to the reading of the deposition of Joseph J. Cardona on the trial of this action for the reason that the same is not certified to as the deposition of Edward Reynolds as required by law, in that the purported certificate of Richard T. Thompson, a purported notary, contains no venue, and is not a certificate in fact, and said deposition of said Joseph J. Cardona is, therefore, not certified to.

Comes now the plaintiff in the above entitled action and objects and excepts to the interrogatories propounded to Edward Reynolds in his deposition filed herein, as follows:

1. Plaintiff objects and excepts to interrogatory No. 5, for the reason that same is incompetent, irrelevant and immaterial, calls for conclusions of the witness and there is no sufficient foundation laid therefor; and assumes facts not proven.

Plaintiff moves to strike the answer to interrogatory No. 5 for the reason that the same is incompetent, irrelevant and immaterial, and no sufficient foundation laid, and it states conclusions of the witness and is argumentative.

2. Plaintiff objects and excepts to interrogatory No. 6 for the reason that the same is incompetent, irrelevant and immaterial, calls for a conclusion of the witness and no sufficient foundation laid, and no proof whatever that the witness has any familiarity with the facts with respect to which he is asked to testify.

3. Plaintiff objects and excepts to interrogatory No. 7 for the reason that the same is incompetent, irrelevant and immaterial and no sufficient foundation laid.

Plaintiff objects and excepts to the introduction in evidence of Exhibit 1, referred to immediately following interrogatory and answer No. 7 for the reason that the same is incompetent, irrelevant and immaterial and no sufficient foundation laid.

4. Plaintiff objects and excepts to interrogatory No. 8 for the reason that the same is incompetent, irrelevant and immaterial, calling for a conclusion of the witness, no sufficient foundation laid,

and that it does not appear that the witness has any familiarity whatever with the matter with respect to which he is asked to testify.

5. Plaintiff objects and excepts to interrogatory No. 9 for the reason that the same is incompetent, irrelevant and immaterial, leading, suggestive, and no sufficient foundation laid.

31 Plaintiff objects and excepts to the introduction in evidence of the certificate of incorporation, Exhibit 2, referred to immediately following interrogatory No. 9 for the reason that the same is incompetent, irrelevant and immaterial a purported copy, not the original and not the best evidence, and no sufficient foundation laid.

7. Plaintiff objects and excepts to interrogatory No. 10 for the reason that the same is incompetent, irrelevant and immaterial, calls for a conclusion of the witness, calls for opinion evidence and not for facts, and there is no sufficient foundation laid.

8. Plaintiff objects and excepts to interrogatory No. 12 for the reason that same is incompetent, irrelevant and immaterial, calls for a conclusion of the witness, calls for opinion evidence and there is no sufficient foundation laid.

9. Plaintiff objects and excepts to answer to interrogatory No. 12 and moves to strike the same for the reason that the same is incompetent, irrelevant, and immaterial, is argumentative, states conclusions of the witness and usurps the province of the court.

10. Plaintiff objects and excepts to interrogatory No. 13 for the reason that same is incompetent, irrelevant and immaterial, argumentative, not calling for or anticipating an answer.

11. Plaintiff objects and excepts to interrogatory No. 15 for the reason that the same is leading, and suggestive.

12. Plaintiff objects and excepts to second paragraph of the answer to interrogatory No. 20 and moves to strike the same for the reason that it is not responsive, argumentative, usurping the province of the court, and no sufficient foundation laid.

13. Plaintiff objects and excepts to interrogatory No. 21 for the reason that the same is incompetent, irrelevant and immaterial, not in issue, and no sufficient foundation laid.

14. Plaintiff objects and excepts to the answer to interrogatory No. 21 and moves to strike the same for the reason that the same is incompetent, irrelevant and immaterial, not in issue, and no sufficient foundation laid.

15. Plaintiff objects and excepts to interrogatory No. 22 for the reason that same is incompetent, irrelevant and immaterial and no sufficient foundation laid.

16. Plaintiff objects and excepts to interrogatory No. 23 for the reason that same is incompetent, irrelevant and immaterial and no sufficient foundation laid.

17. Plaintiff objects and excepts to interrogatory No. 24, for the reason that same is incompetent, irrelevant and immaterial and no sufficient foundation laid, and is leading.

18. Plaintiff objects and excepts to interrogatory No. 25 for the reason that same is incompetent, irrelevant and immaterial, and no sufficient foundation laid.

19. Plaintiff objects and excepts to interrogatory No. 26 for the reason that same is incompetent, irrelevant and immaterial, and no sufficient foundation laid.

20. Plaintiff objects and excepts to interrogatory No. 27 for the reason that same is incompetent, irrelevant, immaterial, and
32 no sufficient foundation laid, and assumes facts not proven.

21. Plaintiff objects and excepts to interrogatory No. 28 for the reason that same is incompetent, irrelevant and immaterial, and no sufficient foundation laid.

22. Plaintiff objects and excepts to interrogatory No. 29 for the reason that same is incompetent, irrelevant and immaterial, and no sufficient foundation laid.

23. Plaintiff objects and excepts to interrogatory No. 30 for the reason that same is incompetent, irrelevant and immaterial, and no sufficient foundation laid.

24. Plaintiff objects and excepts to interrogatory No. 31 for the reason that same is incompetent, irrelevant and immaterial, and no sufficient foundation laid.

25. Plaintiff objects and excepts to interrogatory No. 32 for the reason that same is incompetent, irrelevant and immaterial, and no sufficient foundation laid.

26. Plaintiff objects and excepts to interrogatory No. 33 for the reason that same is incompetent, irrelevant and immaterial, and no sufficient foundation laid.

27. Plaintiff objects and excepts to interrogatory No. 34 for the reason that same is incompetent, irrelevant and immaterial, and no sufficient foundation laid.

28. Plaintiff objects and excepts to interrogatory No. 35 for the reason that same is incompetent, irrelevant and immaterial, and no sufficient foundation laid.

29. Plaintiff objects and excepts to interrogatory No. 36 for the reason that same is incompetent, irrelevant and immaterial, and no sufficient foundation laid.

30. Plaintiff objects and excepts to interrogatory No. 37 for the reason that same is incompetent, irrelevant and immaterial, and no foundation laid, and calls for an opinion of the witness.

21. Plaintiff objects and excepts to answer to interrogatory No. 37 and moves to strike the same for the reason that it is incompetent,

irrelevant and immaterial, not responsive to the interrogatory and no sufficient foundation laid therefor.

Comes now the plaintiff in the above entitled action and objects and excepts to the interrogatories propounded to Joseph J. Cardona in his deposition filed herein as follows:

1. Plaintiff objects and excepts to interrogatory No. 14 for the reason that the same is leading, suggestive, and incompetent, irrelevant and immaterial.

2. Plaintiff objects and excepts to interrogatory No. 15 for the reason that same is incompetent, irrelevant, and immaterial, suggestive, and no sufficient foundation laid, and it appearing from the preceding questions that the witness is a non resident and located in New York and that these books are kept in Nebraska.

3. Plaintiff objects and excepts to interrogatory No. 16 for the reason that the same is incompetent, irrelevant and immaterial, leading and no sufficient foundation laid.

33 4. Plaintiff objects and excepts to interrogatory No. 17 for the reason that the same is incompetent, irrelevant and immaterial, leading and no sufficient foundation laid.

5. Plaintiff objects and excepts to interrogatory No. 18 for the reason that the same is leading, suggestive, incompetent, irrelevant and immaterial, and no sufficient foundation laid.

6. Plaintiff objects and excepts to the introduction in evidence of Exhibits A. B. C. D. E. and F. referred to immediately following interrogatory and answer No. 18 for the reason that the same are incompetent, irrelevant and immaterial, do not tend to prove or disprove any issue in this case, no sufficient foundation laid therefor.

7. Plaintiff objects and excepts to that portion of interrogatory No. 20 following the figures 1915, for the reason that the same calls for a conclusion of the witness, is incompetent, irrelevant and immaterial, and there is no sufficient foundation laid therefor.

8. Plaintiff objects and excepts to interrogatory No. 21 for the reason that the same is incompetent, irrelevant, and immaterial, and no sufficient foundation laid therefor.

9. Plaintiff objects and excepts to interrogatory No. 22 for the reason that the same is incompetent, irrelevant and immaterial, and no sufficient foundation laid therefor.

10. Plaintiff objects and excepts to interrogatory No. 24 for the reason that the same is incompetent, irrelevant and immaterial, and no sufficient foundation laid therefor.

11. Plaintiff objects and excepts to interrogatory No. 25 for the reason that same is incompetent, irrelevant and immaterial.

12. Plaintiff objects and excepts to interrogatory No. 28 for the reason that the same is incompetent, irrelevant and immaterial, and no sufficient foundation laid therefor.

13. Plaintiff objects and excepts to interrogatory No. 29 for the reason that the same is incompetent, irrelevant and immaterial, and no sufficient foundation laid.

14. Plaintiff objects and excepts to the introduction in evidence of Exhibits 3, 4 and 5 referred to immediately following interrogatory and answer No. 29 for the reason that same are incompetent, irrelevant and immaterial, and no sufficient foundation laid therefor.

15. Plaintiff objects and excepts to interrogatory No. 30 for the reason that same is incompetent, irrelevant and immaterial, and no sufficient foundation laid therefor.

16. Plaintiff objects and excepts to interrogatory No. 31 for the reason that same is incompetent, irrelevant and immaterial, and no sufficient foundation laid therefor.

17. Plaintiff objects and excepts to interrogatory No. 32 for the reason that same is incompetent, irrelevant and immaterial.

18. Plaintiff objects and excepts to the introduction in evidence of Exhibits No. 6 and 7 referred to immediately following interrogatory and answer No. 32 for the reason that same are incompetent, irrelevant and immaterial and no sufficient foundation laid therefor.

19. Plaintiff objects and excepts to interrogatory No. 33
34 for the reason that same is incompetent, irrelevant and immaterial, not the best evidence, the receipts themselves being the best evidence of what they contain.

20. Plaintiff objects and excepts to interrogatory No. 34 for the reason that same is incompetent, irrelevant and immaterial, not the best evidence, the receipts themselves being the best evidence of what they contain.

21. Plaintiff objects and excepts to interrogatory No. 35 for the reason that the same is incompetent, irrelevant and immaterial, not the best evidence, and no sufficient foundation laid therefor.

22. Plaintiff objects and excepts to interrogatory No. 36 for the reason that the same is incompetent, irrelevant and immaterial, not the best evidence, and no sufficient foundation laid therefor.

23. Plaintiff objects and excepts to interrogatory No. 37 for the reason that the same is incompetent, irrelevant and immaterial and no sufficient foundation laid therefor.

24. Plaintiff objects and excepts to interrogatory No. 38 for the reason that same is incompetent, irrelevant and immaterial, no sufficient foundation laid therefor, is not the best evidence.

25. Plaintiff objects and excepts to interrogatory No. 39 for the reason that same is incompetent, irrelevant and immaterial, no sufficient foundation laid, and is not the best evidence.

26. Plaintiff objects and excepts to interrogatory No. 40 for the reason that same is incompetent, irrelevant and immaterial, no sufficient foundation laid, and is not the best evidence.

27. Plaintiff objects and excepts to interrogatory No. 41 for the reason that same is incompetent, irrelevant and immaterial, no sufficient foundation laid, and is not the best evidence.

28. Plaintiff objects and excepts to interrogatory No. 42 for the reason that same is incompetent, irrelevant and immaterial, no sufficient foundation laid, and is not the best evidence.

29. Plaintiff objects and excepts to interrogatory No. 43 for the reason that same is incompetent, irrelevant and immaterial, no sufficient foundation laid, and is not the best evidence.

30. Plaintiff objects and excepts to interrogatory No. 44 for the reason that same is incompetent, irrelevant and immaterial, no sufficient foundation laid, and is not the best evidence.

31. Plaintiff objects and excepts to interrogatory No. 45 for the reason that same is incompetent, irrelevant and immaterial, no sufficient foundation laid, and is not the best evidence.

32. Plaintiff objects and excepts to interrogatory No. 46 for the reason that the same is incompetent, irrelevant and immaterial, not the best evidence, no sufficient foundation laid, and suggestive.

33. Plaintiff objects and excepts to interrogatory No. 47 for the reason that the same is incompetent, irrelevant and immaterial, no sufficient foundation laid.

35 34. Plaintiff objects and excepts to interrogatory No. 49 for the reason that the same is incompetent, irrelevant and immaterial, no sufficient foundation laid, calling for a conclusion of the witness.

35. Plaintiff objects and excepts to interrogatory No. 50 for the reason that the same is incompetent, irrelevant and immaterial, no sufficient foundation laid, calling for a conclusion of the witness.

36. Plaintiff objects and excepts to interrogatory No. 51 for the reason that the same is incompetent, irrelevant and immaterial, no sufficient foundation laid, calling for a conclusion of the witness.

37. Plaintiff objects and excepts to interrogatory No. 52 for the reason that the same is incompetent, irrelevant and immaterial, no sufficient foundation laid, calling for a conclusion of the witness.

38. Plaintiff objects and excepts to interrogatory No. 53 for the reason that the same is incompetent, irrelevant and immaterial, no sufficient foundation laid, calling for a conclusion of the witness.

39. Plaintiff objects and excepts to interrogatory No. 54 for the reason that the same is incompetent, irrelevant and immaterial, no sufficient foundation laid, calling for a conclusion of the witness.

40. Plaintiff objects and except to interrogatory No. 55 for the reason that the same is incompetent, irrelevant and immaterial, no sufficient foundation laid, calling for a conclusion of the witness.

41. Plaintiff objects and excepts to interrogatory No. 56 for the reason that the same is incompetent, irrelevant and immaterial, no sufficient foundation laid therefor.

42. Plaintiff objects and excepts to interrogatory No. 57 for the reason that the same is incompetent, irrelevant and immaterial.

43. Plaintiff objects and excepts to interrogatory No. 58 for the reason that the same is incompetent, irrelevant and immaterial, calling for a conclusion of the witness and no sufficient foundation laid.

44. Plaintiff objects and excepts to interrogatory No. 59 for the reason that the same is incompetent, irrelevant and immaterial and No sufficient foundation laid.

45. Plaintiff objects and excepts to interrogatory No. 60 for the reason that the same is incompetent, irrelevant and immaterial and no sufficient foundation laid.

46. Plaintiff objects and excepts to interrogatory No. 61 for the reason that the same is incompetent, irrelevant and immaterial and no sufficient foundation laid.

47. Plaintiff objects and excepts to interrogatory No. 62 for the reason that the same is incompetent, irrelevant and immaterial.

48. Plaintiff objects and excepts to interrogatory No. 63 for the reason that the same is incompetent, irrelevant and immaterial.

49. Plaintiff objects and excepts to interrogatory No. 64 for the reason that the same is incompetent, irrelevant and immaterial.

36 50. Plaintiff objects and excepts to interrogatory No. 65 for the reason that the same is incompetent, irrelevant and immaterial.

51. Plaintiff objects and excepts to interrogatory No. 66 for the reason that the same is incompetent, irrelevant and immaterial.

52. Plaintiff objects and excepts to interrogatory No. 67 for the reason that the same is incompetent, irrelevant and immaterial, and calls for conclusion of the witness.

53. Plaintiff objects and excepts to interrogatory No. 68 for the reason that the same is incompetent, irrelevant and immaterial, and calls for conclusion of the witness.

54. Plaintiff objects and excepts to interrogatory No. 69 for the reason that the same is incompetent, irrelevant and immaterial.

J. F. ROHN AND
C. E. ABBOTT,
Attorneys for Plaintiff.

37 And afterwards, on the 21st day of September, 1917, there was filed in the office of said Clerk, a certain Motion in words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, NEBRASKA, Plaintiff,
vs.
POSTAL TELEGRAPH-CABLE COMPANY, Defendant.

Motion.

Comes now plaintiff in the above entitled action and objects to the trial of said cause to a jury, and moves the court for a trial of said cause to the court; and for reason therefor shows to the court by the pleadings on file therein that there is no issue presented thereby to be submitted to a jury or properly submitted to a jury.

J. F. ROHN AND
C. E. ABBOTT,
Attorneys for Plaintiff.

And afterwards, on the 21st day of September 1917, there was filed in the office of said Clerk, a certain Motion in words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, NEBRASKA, Plaintiff,
vs.
POSTAL TELEGRAPH-CABLE COMPANY, a Corporation, Defendant.

Motion.

This case being on trial and both parties having introduced their evidence and rested, the plaintiff

1. Moves the court to withdraw this case from the jury, for the reason that on the pleadings and the evidence there is no question for submission to a jury.

38 2. Moves the court to enter judgment in favor of the plaintiff and against the defendant as prayed for in plaintiff's petition for the reason that on the pleadings and the evidence plaintiff is entitled to judgment.

J. F. ROHN AND
C. E. ABBOTT,
Attorneys for Plaintiff.

39 And afterwards, on the 21st day of September 1917, there was entered of record in the office of said Clerk a certain Journal Entry in words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, Plaintiff,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, a Corp., Defendant.

On this 21st day of September, 1917, this cause came on for trial, came the parties by their respective counsel, then came a jury, to-wit: Ed Luther, B. W. Reynolds, C. R. Schaeffer, Geo. Nelson, Ihno Harms, R. B. Sloss, Leslie Chaney, Fred Werblow, Conrad Nolte, H. G. Frederickson, Byron Sanderson and S. Kostlan, twelve good men and true who were duly impanelled and sworn to try the issues in this case, and evidence was taken until the hour of adjournment. Leave to strike paragraph "No. 2" from the reply. Objections to jury overruled. Plaintiff excepts. Evidence closed and motion of plaintiff for a directed verdict sustained, the same day jury returned verdict for the sum of $135.00. Judgment on verdict for plaintiff in sum of $135.00 and the costs taxed to defendant. Defendant excepts.

40 And afterwards, on the 21st day of September, 1917, there was entered of record in the office of said Clerk a certain Journal Entry in words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, NEBRASKA, Plaintiff,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, a Corporation, Defendant.

Now on this 21st day of September 1917, the evidence being all in and both parties having rested; the plaintiff, in open court filed its motion that the case be withdrawn from the jury and for judgment by the court in favor of the plaintiff as prayed for in its petition. The court considers and treats said motion as a motion for a directed verdict in favor of plaintiff and against the defendant.

It is therefore ordered by the court that said motion of plaintiff for a directed verdict be and same is hereby sustained, and jury is hereby directed to return a verdict in favor of the plaintiff and against the defendant for the sum of $135.90. To which defendant excepts.

By the Court,

FREDERIC W. BUTTON,
Judge.

In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, NEBRASKA, Plaintiff,

vs.

POSTAL TELEGRAPH COMPANY, a Corporation, Defendant.

41 *Verdict.*

We, the jury duly impannelled and sworn in the above entitled action do find for the paintiff and assess the amount of its recovery at $135.00.

B. W. REYNOLDS,
Foreman.

And afterwards, on the 21st day of September, 1917, there was entered of record in the office of said Clerk a certain Judgment in words and figures following, to wit:

In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, NEBRASKA, Plaintiff,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, a Corporation, Defendant.

Judgment.

42 Now on this 21st day of September, 1917, the jury, herein having returned a verdict for the plaintiff and against the defendant in the sum of $135.90 and this cause coming on for hearing for judgment on said verdict, it is hereby considered, ordered and adjudged that the plaintiff do have and recover from the defendant the sum of $135.90 and seven per cent interest from this date, together with its costs taxed at $—; to which judgment defendant excepts.

FREDERICK W. BUTTON,
Judge.

And afterwards, on the 24th day of September, 1917, there was filed in the office of said Clerk a certain Motion for a New Trial in words and figures following, to wit:

In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, NEBRASKA, Plaintiff,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, a Corporation, Defendant.

Motion for a New Trial.

The defendant in the above entitled cause moves the Court to set aside the verdict returned in said cause and vacate the judgment en-

tered thereon, and grant a new trial in said cause upon the following grounds and for the following reasons, to wit:

1. The Court erred in sustaining Plaintiff's motion requesting the court to instruct the jury to return a verdict for the plaintiff.

43 2. The Court erred in instructing the jury to return a verdict for the plaintiff.

3. The court erred in entering judgment upon the verdict returned by the jury.

4. That said verdict is not sustained by sufficient evidence.

5. That said verdict is contrary to law.

6. Errors of law occurring at the trial and duly excepted to by the defendant at the time.

DYSART & DYSART,
Attorneys for Defendant.

And afterwards, on the 24th day of September, 1917, there was filed in the office of said clerk a certain Journal Entry in words and figures following, to wit:

In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, NEBRASKA, Plaintiff,

vs.

POSTAL TELEGRAPH CABLE COMPANY, a Corporation, Defendant.

Now on this 24th day of September, 1917, this cause came on further to be heard upon the motion of plaintiff for a new trial of said cause. On consideration of said motion the court does hereby overrule the same; to which order defendant excepts, and defendant is given forty days from the rising of the court to settle and serve Bill of Exceptions.

FREDERIC W. BUTTON,
Judge.

44 And afterwards, on the 3rd day of October, 1917, there was filed in the office of said Clerk a certain Appeal Undertaking in words and figures following, to wit:

In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, NEBRASKA, Plaintiff,

vs.

POSTAL TELEGRAPH CABLE COMPANY, a Corporation, Defendant.

Appeal Undertaking.

Whereas on the 21st day of September, 1917, city of Fremont, Nebraska, Plaintiff herein recovered a judgment against Postal Tele-

graph Cable Company, a corporation, defendant herein, in said court for the sum of One Hundred Thirty-five and Ninety hundredths ($135.90) Dollars costs of said suit taxed at $—, and the said defendant intends to appeal said cause to the Supreme Court of the State of Nebraska:

Now therefore, I, Postal Telegraph Cable Company as principal, and Fidelity and Deposit Company of Maryland, of Baltimore, Maryland, as surety, do hereby promise and undertake to the said plaintiff in the sum of Three Hundred Twenty-Five ($325.00) Dollars, that said Postal Telegraph Cable Company shall prosecute its appeal to effect and without delay; and that said appellant if judgment be adjudged against it on appeal, will satisfy such judgment and costs.

Dated at Omaha, Nebraska, this 26th day of September, 1917.

POSTAL TELEGRAPH CABLE COMPANY,
By DYSART & DYSART,
Attorneys for Defendant.

45 FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By HARRY J. BROWN, [SEAL.]
Attorney in Fact.

The foregoing bond and surety approved by me 2nd day of October, 1917.

[SEAL.] P. T. MITTERLING,
Clerk of District Court.

And afterwards, on the 3rd day of October, 1917, there was filed in the office of said Clerk a certain Notice of Appeal in words and figures following, to wit:

In the District Court of Dodge County, Nebraska.

CITY OF FREMONT, NEBRASKA, Plaintiff,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, a Corporation, Defendant.

Notice of Appeal.

Comes now Postal Telegraph-Cable Company, a corporation, the above named defendant, and gives notice of intention to prosecute an appeal to the Supreme Court of the State of Nebraska, from the judgment heretofore rendered against it.

Signed this 2nd day of October, 1917.

POSTAL TELEGRAPH
CABLE COMPANY,
By DYSART & DYSART,
Its Attorneys.

46 STATE OF NEBRASKA,
Dodge County, ss:

I, P. T. Mitterling, Clerk of the District Court in and for Dodge County, Nebraska, do hereby certify that the foregoing is a full true, and complete transcript of the Petition, Amended and Substituted Answer, Journal Entries of Empanelling Jury, Trial, etc., Objections and Exceptions, Motion, Motion, Motion for Instructed Verdict, Verdict, Judgment, Motion for New Trial, Order Overruling Motion for New Trial, Supersedeas Bond and Approval, Notice of Appeal in the case of City of Fremont, Nebraska, against Postal Telegraph Cable Company, a Corporation, as fully as the same remains on file and of record in my office.

The Bill of Exceptions hereto attached is the original bill of exceptions allowed by the court and filed in my office.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of said District Court, this 22nd day of November, A. D. 1917.

[SEAL.] P. T. MITTERLING,
Clerk.
By J. EMMA ROBINSON,
Deputy.

Cost of Transcript $10.00.

Endorsed: Filed Nov. 17, 1917, P. T. Mitterling, Clerk Dist. Court.

Endorsed: No. 20419. City of Fremont v. Postal Telegraph Cable Co. Transcript. Supreme Court of Nebraska. Filed Nov. 27, 1917. H. C. Lindsay, Clerk.

47 And on this same day, to-wit, Nov. 27, 1917, there was filed in the office of the Clerk of said Supreme Court, a certain Bill of Exceptions, in words and figures following, to-wit:

48 In the District Court of Nebraska in and for Dodge County, September Term, A. D. 1917, September 21st, 1917, Friday.

THE CITY OF FREMONT, NEBRASKA, Plaintiff,
vs.
POSTAL TELEGRAPH-CABLE COMPANY, a Corporation, Defendant.

Reporter's Transcript of Record of Trial and Bill of Exceptions.

Before Frederic W. Button, Judge and a Jury.

Appearances: C. E. Abbott, City Attorney; Dysart & Dysart, Attorneys for Defendant.

49 Received for examination and amendment, from the attorneys for the defendant, the Reporter's transcript of the

Record of Trial, in the case of the City of Fremont, Nebraska, plaintiff, vs. The Postal Telegraph-Cable Company, defendant, Dodge County District Court, Nebraska.

Dated this 5th day of November, 1917.

ABBOTT & ROHN,
Attorneys for Plaintiff.

At this time, I return the above described Reporter's Transcript of the Record of Trial in the above entitled case, submitted to me by the attorneys for the defendant, and propose amendments thereto as follows:—

Dated this 12 day of November, 1917.

ABBOTT & ROHN,
Attorneys for Plaintiff.

50 We hereby acknowledge receipt of the above described Transcript, returned to us by the attorney for plaintiff.

Dated this 12 day of Nov. 1917.

DYSART & DYSART,
Attorneys for Defendant.

It is hereby stipulated and agreed, by and between the attorneys for the plaintiff and defendant, that the following typewritten pages comprising the Reporter's Transcript of the Record of trial in the case of City of Fremont, Plaintiff, vs. The Postal Telegraph-Cable Company, defendant, contain a full, true and complete record of all the evidence, both oral and documentary, offered, introduced, admitted, heard, read and received on the trial of the above entitled case, as well as a full true and complete record of all objections of counsel, all rulings of the court thereon, all exceptions of counsel to such rulings, and all Motions, Stipulations and agreements, made and entered into during said trial.

(Signed)

J. E. ROHN AND
C. E. ABBOTT,
Attorneys for Plaintiff.

Dated this 17 day of Nov. 1917.

DYSART & DYSART,
Attorneys for Defendant.

51 I, Frederic W. Button, one of the judges of the 6th Judicial District of Nebraska, and the judge before whom this case was tried and determined, hereby certify that the following typewritten pages, comprising the Reporter's Transcript of the Record of trial in the case of The City of Fremont, plaintiff, vs. The Postal Telegraph-Cable Company, defendant, tried in Dodge County, Nebraska, District Court, at the September Term, 1917, contains all the evidence offered, introduced, admitted, heard, read and received, on the trial of the above entitled case, as well as all objections made by respective counsel, all rulings of the court, all exceptions of counsel thereto, all agreements, stipulations and motions, entered into

and made during said trial, and, upon the application of the attorneys for defendant, this above described transcript of the reporter is made a Bill of Exceptions and is ordered to be made a part of the record of this case.

Done at —, Nebraska, this 17th day of Nov. 1917.

FREDERIC W. BUTTON,
Judge.

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53 Fremont, Nebraska, September 21, 1917.

9 O'clock A. M., Friday.

Now at this time this case being called for trial, viz., The City of Fremont, Nebraska, plaintiff, vs. The Postal Telegraph Cable Company, defendant, the plaintiff being represented by C. E. Abbott and J. P. Rohn, attorneys, and the defendant by Dysart & Dysart, attorneys of Omaha, Nebraska, each party declaring their readiness for trial, a jury was called into the box, examined, selected and

sworn, statements made by the respective attorneys of the issues involved, and then the following proceedings were done and had, viz:

Mr. Abbott: It is stipulated in open court, between the parties that the plaintiff, the City of Fremont, is a corporation, municipal corporation, duly organized and existing as in Paragraph I of plaintiff's petition set forth, and has been such for more than thirteen years last past, since 1901—and that Exhibits "A" and "B" attached to plaintiff's petition are correct copies of ordinances duly passed, approved and published on the dates set forth in plaintiff's petition, the formal parts thereof being admitted, and proof of said ordinances is waived, and the same may be introduced without further proof or foundation. It is further admitted that Exhibit "A" is a re-enactment and re-publication of an ordinance of the City of Fremont which has been in force prior to the year 1903. Defendant waives formal proof of each of said ordinances.

Mr. Dysart: Defendant reserves all objections to said ordinances as to competency, relevancy and materiality, other than those that pertain to formal proof.

54 (Exhibit "A".)

Mr. Abbott: And it is admitted that Exhibit "A" is a re-enactment in 1907 of an ordinance that had been in force since prior to the year 1903.

The plaintiff offers in evidence Chapter 9 of the ordinances of the City of Fremont, being an ordinance attached to plaintiff's petition as Exhibit "A", together with the certificate attached thereto.

Mr. Dysart: To which the defendant objects and excepts, for the reason that it is immaterial, irrelevant, and has no application to the issues in this case, and does not affect the rights of the defendant herein.

Objection overruled. Defendant excepts.

Exhibit "A" being admitted, the same is here set out as follows:

EXHIBIT "A."

Revised Ordinances of the City of Fremont.

Chapter 9.

Taxation.

Article I.—Occupation Tax.

Sec. 311. Levied.—That there is hereby levied a license tax on each and every occupation and business within the limits of this city, in this section enumerated to raise revenue thereby in the sev-

eral different sums on the several different businesses and occupations respectively as follows:

Telegraph Offices.—The sum of sixty dollars per year on the business and occupation of receiving messages in this city from persons in this city and transmitting the same by telegraph from this city within this state to persons and places within this state, and receiving in this city messages by telegraph transmitted within this state from persons and places within this state to persons within this city and delivering the same to persons in this city, excepting the receipt, transmission and delivery of such messages to and from any department, agency or agent of the United States, and excepting the receipt, transmission and delivery of any such messages which are interstate commerce; the business and occupation of receiving, transmitting and delivering of the messages herein excepted is not taxed hereby.

55 Telephone.—The sum of sixty dollars per year on the business and occupation of transmitting messages and conversation by means of telephones between persons, and places in this City, and receiving and transmitting messages and conversation by means of telephones from persons in this City to persons and places within this state.

Express.—The sum of sixty dollars per year on the business and occupation of receiving packages or goods in this city from persons in this city destined to persons and places within this state and conveying the same within this state to persons and places within this state and receiving in this city packages and good- destined to be conveyed within this state from persons and places within this state, and delivering the same to persons in this city.

Saloon.—The sum of four hundred dollars per year on each saloon selling intoxicating liquor and on each dealer in intoxicating liquors whether wholesale or retail not conducting a saloon, except druggists.

Billiard and Pool Tables.—The sum of ten dollars per year on the business of keeping a billiard or pool table and charging persons for playing thereon, and every person having more than one such table the sum of five dollars in addition to the above for each additional table per year.

Wholesale Kerosene, etc.—The sum of twenty-five dollars per year on the business and occupation of selling at wholesale any kerosene, gasoline or any other liquid oil or gaseous fluid for illumination or other purposes.

Hawkers and Peddlers.—The sum of five dollars per day on each hawker and on each peddler of goods at retail, by sample, or by taking orders or otherwise; this does not include commercial travelers selling to dealers only. And for the purpose of this article any person, persons, firm or corporation, who shall upon any street, avenue, sidewalk or alley, or from any stand or vehicle within said city expose or offer or cry for sale any goods, wares, merchandise or articles of any kind shall be taken and deemed to be a hawker; and any person traveling from house to house or from place to place in the City of Fremont, Nebraska, exposing and offering for sale, lease, barter or exchange at retail, by sample, by taking orders or

otherwise, any goods, wares, merchandise, or any article of any kind shall be deemed to be a peddler.

Beer Vault.—The sum of twenty five dollars per year on the business and occupation of maintaining and keeping a beer vault.

Itinerant Physician.—On each itinerant physician or surgeon $25 per day.

Itinerant Dentist.—On each itinerant dentist $25 per day.

Photograph Wagons, etc.—On each photograph wagon, tent or car, $5 per day.

Auctioneer.—On each auctioneer, $5.00 per day.

Cane Racks, etc.—On each cane rack, knife board, baby rack, electric battery, striking machine, or any other game or device carried on in said city $5 per day, $25 per year.

Itinerant Vendor.—On each itinerant vendor of fruits, potatoes, vegetables, flowers, groceries, hay, straw, grain or other kinds of goods not herein specified, which is shipped in car load or wagon load lots or less $5 per day; this does not include farmers selling products of their own raising.

Opticians, etc., Specialists.—On each itinerant optician, oculist, aurist, or other specialist, $5 per day.

56 Magazine and Book Agent.—On each itinerant magazine or book agent $10 per month, $1.50 per day.

Enlarging Pictures.—On each canvasser or solicitor for pictures or for enlarging pictures $5 per day.

Clairvoyant, etc.—On each clairvoyant, phrenologist or mind reader $5 per day.

Phonographs, etc.—On each phonograph, stereopticon, peep show, or Punch and Judy show $2 per day.

Horse Trader.—On each transient horse trader $5 per day, $20 per week.

Pawnbroker.—On each pawnbroker $15 per year.

Fortune Teller, Palmist.—On each itinerant fortune teller or palmist $2 per day.

Installment Business, etc.—On each merchant, doing installment, lease or rental business, $10 per month for each solicitor or canvasser (whether owner or employee.)

Street Musician.—On each street musician $1 per day.

Bowling Alleys.—On each bowling alley, $5 per month, $50 per year.

Shooting Galleries.—On each shooting gallery $5 per month $50 per year.

Merry-go-round.—On each merry-go-round or revolving swing operated by steam, $5 per day; operated by man or horse power $3 per day.

Circus, etc.—On each circus or circus and menagerie with more than one ring $50 per day; one ring where the admission exceeds twenty five cents $50 per day; one ring where the admission does not exceed twenty-five cents $25 per day; menagerie $15 per day; wild west show $50 per day; side show, panorama, concert or minstrel entertainment with circus $10 per day; under cover of canvas $10 per day; all other entertainments of like nature $10 per day; circus parade, wild west parade or menagerie parade $50 per day; provided that circuses or circuses and menagerie or wild west show

paying the occupation tax hereinbefore mentioned shall not be liable for the parade tax.

Showing Under Canvas.—On each theatrical troupe showing under canvas $5 per day.

Transient Dealers.—Twenty-five dollars per day on transient dealers; and for the purpose of this article any person, company or corporation who shall bring or cause to be brought into the City of Fremont, and sell or offer for sale, by piece, parcel or bulk any specific stock of goods, wares, or merchandise, or bankrupt or damaged gods, or stocks of merchandise, shall be deemed and considered transient dealers.

Sec. 312. Excluded Interstate Business.—The license tax by this article levied is not levied upon any business or occupation which is interstate, or which is done or conducted by any department of the government of the United States, or of this state, or any officer of the United States or of this state in the course of his official duties, or by any county or any subdivision of this state, or its officers as such.

Sec. 313. When Payable.—On all occupations and business on which said tax is levied at a yearly rate the year for such tax
57 shall be deemed to begin on the last Tuesday of April of each year, and shall end on the last Tuesday of April in the year following, and the said tax for that year shall be due and payable in advance on the last Tuesday of April. Provided, that when the occupation or business begins after the last Tuesday in April, then the tax shall be payable in advance immediately before the business begins, and shall unless otherwise provided by ordinance expire on the last Tuesday of April following date.

On occupations and business on which said tax is levied at a daily, or weekly rate said tax shall be deemed payable in advance immediately before the business begins, for the whole number of days, or weeks, as the case may be, for which the occupation or business is to be carried on within the taxing year; and all payments of said tax shall be made on the last Tuesday of April in each year except where in any year the business begins after the last Tuesday in April in that year.

Sec. 314. Duty to Pay.—It is hereby made the duty of every person, partnership, firm and corporation engaged in carrying on any business or occupation within the limits of this city on which a license tax is levied by this article, to pay said tax at the times provided for its payment in section 313 of this ordinance.

Sec. 315. Where Payable. Receipts.—The tax hereby levied shall be paid to the treasurer of this city, who, upon payment thereof by any person shall give a receipt properly dated and specifying the person paying, the occupation, the amount, and for what time the tax is paid; said treasurer shall keep proper account of said tax.

Sec. 316. Yearly Tax. How Paid. Saloons May Be Quarterly.—Fractions. All license tax levied at a yearly rate must be paid in one payment for the whole year. License tax on saloons and liquor dealers may at their option and upon their giving to the city a

proper bond with sureties to be approved by the Mayor and Council conditioned for the payment of such tax to be paid in four equal installments quarterly in advance.

And in case of weekly or daily rate each fraction of a day or week, as the case may be, shall be taken to be a week or day.

Sec. 317. Penalty.—Any person violating any of the provisions of this article shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding one hundred dollars, and be committed until such fine and costs of prosecution are paid.

58 STATE OF NEBRASKA,
Dodge County,
City of Fremont, ss:

I, C. A. De La Matyr, City Clerk of the City of Fremont, in Dodge County, State of Nebraska, do hereby certify that the annexed ordinance Number 503 of said City, was duly passed by the Council of said City, pursuant to the rules and regulations provided by said Council for the passage or ordinances, and was duly approved by the Mayor of said City, such passage and approval being made on the 29th day of January, 1907; that the said ordinance was published —.

In Witness Whereof I have hereunto set my hand and the seal of the said City, this 9th day of December, 1916.

C. A. DE LA MATYR,
City Clerk.

59 (Exhibit "A" was read to the jury.)

Mr. Abbott: Plaintiff offers in evidence Exhibit "B" attached to plaintiff's petition, together with the certificate attached, entitled "Article 10. Telegraph and Telephone Poles," and being a portion of the revised ordinances of the City of Fremont.

Mr. Dysart: Defendant objects for the reason that it is immaterial, irrelevant and not admissible under the issues in this case, not affecting the rights of the defendant herein.

Objection overruled. Defendant excepts.

The same being admitted, was read to the jury and is hereto set out as follows:

EXHIBIT "B".

Revised Ordinances of the City of Fremont.

Article X.

Telegraph and Telephone Poles.

Sec. 127. Consent of Mayor and Council. Restrictions.—That any person, company or corporation is hereby authorized to erect poles and wires on the streets of the City of Fremont for the purpose of erecting and maintaining any telephone, telephones, telegraph or telegraphs

upon obtaining the consent of the Mayor and Council to such use of the streets, provided, that such poles and wires be so erected as to in no manner interfere with the public use of the streets and sidewalks of said city; and provided further that the erection of such poles and wires shall always be under the supervision and control of the committee on streets and sidewalks of said city; and provided further, that the location and height of any pole or wire may at any time be changed by the Council.

Sec. 128. Consent, When Given Moving Buildings.—The consent of the Mayor and Council, provided for in the first section of this article may be given at any regular or special meeting of the Council and shall be entered upon the minutes, and such consent shall authorize the use of the streets of said city for the erection of telephone or telegraph lines, subject to such regulations as have been or may be provided by ordinance, provided, that in all cases where any person is desirous of moving any building or buildings through the streets of said city, any party owning and controlling said wires, shall, after having twenty-four hours' notice, raise up said wires high enough to enable the ready and free movement of such buildings.

Sec. 129. Kind and Location of Poles and Wires.—The poles in use by any such person, corporation or company, shall be erected as near the sidewalk as practical, and the wires thereon shall be at least eighteen feet from the ground, except at the intersection or crossing of streets, where such wire shall be at least twenty feet from the ground and whenever any such wire or wires cross any street in said city, it shall cross as near as may be at right angles with the street so crossed.

Sec. 130. Right to Further Regulate, etc. Reserved.—Nothing in this article contained shall be construed to prevent said city from further regulating, licensing or taxing any person, company or corporation owning, using or operating any telephone or telegraph lines within the corporate limits of said City.

Sec. 131. Penalty.—Any person, company or corporation violating any of the provisions of this article, or if any person, company or corporation shall attempt to erect, or shall erect any pole or wire on the streets of said city for the purpose of erecting telephone or telegraph lines, without first obtaining the consent of said city, as provided for in section one hundred twenty-seven of this ordinance, then in either of the above cases, the person, company or corporation so offending shall be guilty of a misdemeanor and on conviction thereof shall be fined not less than ten nor more than fifty dollars, and stand committed until such fine is paid.

STATE OF NEBRASKA,
Dodge County,
City of Fremont, ss:

I, C. A. De La Matyr, City Clerk of the City of Fremont, in Dodge County, State of Nebraska, do hereby certify that the annexed ordinance Number 503 of said City, was duly passed by the Council of

said City, pursuant to the rules and regulations provided by said Council for the passage of ordinances, and was duly approved by the Mayor of said City; such passage and approval being made on the 29th day of January, 1907, that the said ordinance was published —.

In Witness Whereof, I have hereunto set my hand and the seal of the said City, this 24th day of March, 1917.

C. A. DE LA MATYR,
[SEAL.] *City Clerk.*

61 GEORGE A. WOLZ, being produced, sworn and examined on the part of the plaintiff, testified as follows:

Examined by Mr. Abbott.

3 Q. You are a citizen of Fremont?
A. Yes sir.
4 Q. How long have you been a resident of the City of Fremont?
A. Since 1872.
5 Q. Have you been mayor of this city?
A. Yes.
6 Q. During what years were you mayor?
A. From 1903 to 1907, the first term.
7 Q. From 1903 to 1907 the first time?
A. Yes. 1907 to 1909, and 1909 to 1911.
8 Q. Were you mayor of the city when the Postal Telegraph-Cable Co. applied to the city for permission to do business here?
A. Yes.
9 Q. Calling your attention to paper marked Exhibit "C," I will ask you to examine the signatures attached to that and state whose signatures those are, if you know?
A. One is my signature as mayor, and the other is the signature of S. F. Stiles, city clerk.
10 Q. State if you know what that paper is?
A. From all appearances and my remembrance, it is an agreement between the City of Fremont and the Postal-Cable, Postal Telegraph-Cable Company.
11 Q. A resolution passed by the mayor and council.
A. Yes.
12 Q. This resolution purports to be passed October 30, 1903. Is that correct, according to your recollection?
A. As near as I know, yes.

13 Q. Now calling your attention to Exhibit "D," and
62 your particular attention to the acceptance on the back thereof purporting to be made by the Postal Telegraph-Cable Co., you may state whether or not you were familiar with the facts at that time.
A. Yes, I was.
14 Q. Who filed that with the city?
A. The Postal Telegraph-Cable Company.
15 Q. That acceptance?
A. I think that is a part of the records.

16 Q. This refers to this resolution Exhibit "C," does it?
A. Yes.

Mr. Abbott: We offer in evidence Exhibits "C" and "D."
Mr. Dysart: Defendant objects to these exhibits as incompetent, irrelevant, immaterial, no proper foundation laid, not the best evidence, not properly identified.
Court: They are the originals, are they?

Objection overruled. Defendant excepts.
Exhibits "C" and "D" being admitted, the same were read to the jury and are hereto attached as follows:—

63 Whereas, the Postal Telegraph Cable Company, has applied for the consent of the Mayor and the City Council of the City of Fremont, Neb. to use certain streets for telegraph wires and poles, and have promised to comply with the conditions and accept the limitations, and restrictions coupled with such consent, and also to establish and maintain a local office in said City; Therefore,
Be it Resolved by the Mayor and City Council of the City of Fremont, Nebraska:

Sec. 1. That subject to the limitations, restrictions and conditions hereinafter enumerated, the right be and is hereby granted to the Postal Telegraph Cable Company, its successors and assigns, to set one line of poles, string wires and operate and maintain lines of telegraph, including all poles and guys, cables, wires and fixtures thereon, along and over certain streets of the City of Fremont, Neb., as follows, to-wit:
Commencing at the intersection of D. and South Street in Turner's Addition and running west on said South Street to the intersection of South and Broad Street, (said South Street being as described in Section 5 of Ordinance No. 429) "Provided that the consent of the Union Pacific Railway Company be first obtained by said Postal Telegraph Cable Co., and this consent expressly subject to all the provisions of Ordinance No. 429 of said City. Also to string one telegraph wire cable by the most practicable and direct route on streets and alleys from the line aforesaid to the local office of said company, said cable to be placed on the poles of either the Fremont Telephone Company or the Fremont Gas and Electric Light Co., now standing in the streets or alleys to be traversed. Provided that the consent of the owners of said poles be first obtained and that the route selected be first approved by the committee on Streets and Sidewalks of this City.

Sec. 2. Subject to all the provisions of Ordinance No. 346 of the revised ordinances of said City.

Sec. 3. Subject to the condition that the City of Fremont may use the poles so erected for its fire alarm, police, and other necessary public purposes, and may string wires thereon for such purposes, but such wires shall not be so placed as to interfere with the telegraph service.

Sec. 4. Subject to the condition that in case of fires said City may cut away, sever and remove any such poles and wires as may be necessary or expedient without being liable in damages or for compensation.

Sec. 5. Subject to the condition that the placing of wires and poles and all work thereon must be done as required by the committee of said council on streets an sidewalks, and such person as by said committee may be authorized to supervise such work; and said committee may, and shall, suspend, stop and prevent the continuance of the placing of wires and erection of poles, upon any failure to comply with its directions in that behalf, and for any failure to put any street, side-walk, curb, pavement, or ground in as good condition as before such work began, immediately as the work proceeds, and for any unnecessary interference with paving, curbing, curb limit, grounds or trees.

64 Sec. 6. Subject to the condition and requirement that the committee of said council on streets and side-walks, shall see to it that in the construction and maintenance of said lines, the paving, curbing, side-walks, side walk grounds and shade trees shall not be unnecessarily interfered with or materially damaged.

Sec. 7. Subject to all such reasonable regulations, rules and requirements as said City by ordinance, resolution or otherwise, may hereafter make, adopt or prescribe.

Sec. 8. Subject to the condition that the said company shall at all times keep and save the City of Fremont harmless and indemnified from all damages by reason of the construction and operation of said lines.

Sec. 9. Subject to the condition that said Company shall establish and maintain a local office in said City.

Sec. 10. Subject to the condition that the poles so to be erected by said company shall, as far as possible, be of uniform size, style and height, neat andl sym-etrical, properly dressed and firmly set in the ground.

Sec. 11. And subject to the condition and restriction that, for any and every failure to comply with the conditions and requirements above, and for any and every failure to conform and to comply with any and all requirements and regulations that said City may hereafter make within the reservations above, or within said ordinance No. 346, or within the legal powers of said City, and at the expiration of 25 years from date hereof (unless renewed or extended) this consent shall be forfeited and cease to be operative, and said forfeiture being declared by resolution of the Mayor and Council of said City and upon said 25 years having expired (without renewal of consent and extension) the owner, or owners, manager and operator of said Telegraph Company shall within 90 days from notice of such resolution, or upon such expiration of 25 years, remove all such wires and poles from said City leaving the streets, alleys, curb-

ing, sidewalks and grounds within said City in good condition free from obstructions, holes and defects, on account of the same, or on account of such removal; and upon failure so to do, shall be liable to said City in damages and said City may remove and convert to its use all such wires and poles, and recover against said owner or owners, manager and operator all the expense of such removal and restoration of the streets, alleys, curbing, side-walks and grounds to good and proper condition.

Sec. 12. All the terms, conditions, reservations, limitations and restrictions herein shall apply to and be binding upon the successors and assigns of said applicants.

Sec. 13. The acceptance in writing of this resolution, duly executed by the proper officers of the said Postal Telegraph-Cable Company and with the corporate seal of said Company thereto duly affixed and attested, shall be filed with the Clerk of said City of Fremont, prior to the commencement of the construction of said line, and said acceptance shall be attached to this resolution and recorded in the book in which the resolutions of the City of Fremont are recorded.

[SEAL.] GEO. F. WOLZ,
Mayor.

Attest:
S. F. STILES,
City Clerk.

65 STATE OF NEBRASKA,
Dodge County,
City of Fremont, ss:

ATT'S. EX. D.

I, S. F. Stiles, City Clerk of the City of Fremont, in Dodge County, Nebraska, do hereby certify that the annexed copy is a true, complete, and exact copy of the resolution passed by the City Council of Fremont, Nebraska, and approved by the Mayor on the 30th day of October, 1903, granting the right to the Postal Telegraph Cable Company to use certain streets of said city, as the same appears of record and on file in my office.

[SEAL.] (Sig.) S. F. STILES,
City Clerk.

66 Whereas, the Postal Telegraph Cable Company, has applied for the consent of the Mayor and City Council of the City of Fremont, Nebr., to use certain streets for telegraph wires and poles, and have promised to comply with the conditions and accept the limitations, and restrictions coupled with such consent, and also to establish and maintain a local office in said City: Therefore,

Be it Resolved by the Mayor and City Council of the City of Fremont, Nebraska:

Sec. 1. That subject to the limitations, restrictions and conditions hereinafter enumerated, the right be and is hereby granted to the Postal Telegraph Cable Company, its successors and assigns, to set one line of poles, string wires, and operate and maintain lines of telegraph, including all poles and guys, cable, wires and fixtures thereon, along and over certain streets of the City of Fremont, Nebr., as follows, to-wit:

Commencing at the intersection of D and South Street in Turners Addition and running west on said South Street to the intersection of South and Broad Street." (Said South Street being as described in Section 5 of Ordinance No. 429.) "Provided that the consent of the Union Pacific Railway Company be first obtained by said Postal Telegraph Cable Company, and this consent expressly subject to all provisions of Ordinance No. 429 of said City. Also to string one telegraph wire cable by the most practicable and direct route on streets and alleys from the lines aforesaid to the local offices of said Company, said cable to be placed on the poles of either the Fremont Telephone Company or the Fremont Gas and Electric Light Co., now standing in the streets or alleys to be traversed. Provided that the consent of the owner of said poles be first obtained and that the route selected be first approved by the Committee on streets and side-walks of this City.

Sec. 2. Subject to all the provisions of Ordinance No. 346 of the revised ordinance of said City.

Sec. 3. Subject to the condition that the City of Fremont may use the poles so erected for its fire alarm, police, and other necessary public purposes, and may string wires thereon for such purposes, but such wires shall not be so placed as to interfere with the telegraph service.

Sec. 4. Subject to the condition that in case of fires said City may cut away, sever and remove any such poles and wires as may be necessary or expedient without being liable in damages or for compensation.

Sec. 5. Subject to the condition that the placing of wires and poles and all work thereon must be done as required by the committee of said council on streets and sidewalks, and such person as by said committee may be authorized to supervise such work; and said committee may, and shall, suspend, stop and prevent the continuance of the placing of wires and erection of poles, upon any failure to comply with its directions in that behalf, and for any failure to put any street, side-walk, curb, pavement or ground in as good condition as before such work began, immediately as the work proceeds, and for any unnecessary interference with paving, curbing, curb limit, grounds or trees.

Sec. 6. Subject to the condition and requirement that the Committee of said council on streets and side-walks, shall see to it that in the construction and maintenance of said lines, the paving, curb-

ing, side-walks, side-walk grounds and shade trees shall not be unnecessarily interfered with or materially damaged.

Sec. 7. Subject to all such reasonable regulations, rules and requirements as said City by ordinance, resolution or otherwise, may hereafter make, adopt or prescribe.

Sec. 8. Subject to the condition that said Company shall at all times keep and save the City of Fremont harmless and indemnified from all damages by reason of the construction and operation of such lines.

Sec. 9. Subject to the condition that said Company shall establish and maintain a local office in said City.

Sec. 10. Subject to the condition that the poles so to be erected by said Company shall, as far as possible, be of uniform size, style and height, neat and symetrical, properly dressed and firmly set in the ground.

67 Sec. 11. And subject to the condition and restriction that, for any and every failure to comply with the conditions and requirements above, and for any and every failure to conform and to comply with any and all requirements and regulations that said City may hereafter make within the reservations above, or within said ordinance No. 346, or within the legal powers of said City, and at the expiration of 25 years from date hereof (unless renewed or extended) this consent shall be forfeited and cease to be operative, and said forfeiture being declared by resolution of the Mayor and Council of said City and upon said 25 years having expired (without renewal of consent and extension) the owner, or owners, manager and operator of said Telegraph Company shall within 90 days from notice of such resolution, or upon such expiration of 25 years, remove all such wires and poles from said City leaving the streets, alleys, curbing, sidewalks and grounds within said City in good condition free from obstructions, holes and defects, on account of the same, or on account of such removal; and upon failure so to do, shall be liable to said City in damages and said City may remove and convert to its use all such wires and poles, and recover against said owner or owners, manager and operator all the expense of such removal and restorations of the streets, alleys, curbing, sidewalks and grounds to good and proper condition.

Sec. 12. All the terms, conditions, reservations, and limitations and restrictions herein shall apply to and be binding upon the successors and assigns of said applicants.

Sec. 13. The acceptance in writing of this resolution, duly executed by the proper officers of said Postal Telegraph Cable Company and with the corporate seal of said Company thereto duly affixed and attested, shall be filed with the Clerk of said City of said City of Fremont, prior to the commencement of the construction of said line, and said acceptance shall be attached to this resolution and recorded in the book in which the resolutions of the City of Fremont are recorded.

Passed and approved Oct. 30, 1903.

Ordinance No. 346 and 429 attached.

The foregoing ordinance passed, and approved by the Mayor of the City of Fremont, Dodge County, Nebraska, on the 30th day of October, 1903, is hereby accepted this 17th day of November, 1903.

POSTAL TELEGRAPH CABLE COMPANY,

[SEAL.] By WM. H. BAKER,
Vice President.

Attest:
CHAS. P. BUSCH.

I hereby certify that the written acceptance by the Postal Telegraph-Cable Company of the foregoing ordinance was duly filed in my office this 21st day of November, 1903.

S. F. STILES,
Clerk of the City of Fremont, Nebraska.

8 *Ordinance No. 346.*

An Ordinance Relative to Telegraph and Telephone Poles.

Be it ordained by the Mayor and Council of the City of Fremont:

Sec. 1. That any person, company or corporation is hereby authorized to erect poles and wires on the streets of the City of Fremont for the purpose of erecting and maintaining any telephone, telephones, telegraph or telegraphs, upon obtaining the consent of the Mayor and Council of said City to such use of the streets: providing, that such poles and wires to be so erected as to in no manner interfere with the public use of the streets and sidewalks of said City; and provided further, that the erection of such poles and wires shall always be under the supervision and control of the committee on streets and sidewalks of said City; and provided further, that the location and height of any pole or wire, may at any time be changed by the Council.

Sec. 2. The consent of the Mayor and Council, provided for in the first section of this ordinance, may be given at any regular or special meeting of the Council and shall be entered upon the minutes, and such consent shall authorize the use of the streets of said City for the erection of telephone or telegraph lines, subject to such regulations as have been or may be provided by ordinance; provided, that in all cases, where any person is desirous of moving any building or buildings through the streets of the city, any party owning, or controlling said wires, shall, after having twenty-four hours' notice, raise up said wires high enough to enable the ready and free movement of such buildings.

Sec. 3. The poles in use by any such person, corporation or company, shall be erected as near the sidewalk as practical, and the wires

thereon shall be at least eighteen feet from the ground, except all the intersection or crossing of streets where such wires shall be at least twenty feet from the ground, and whenever any such wire or wires cross any street in said City, it shall cross as near as may be at right angle with the street so crossed.

Section 4. Nothing in this ordinance contained shall be construed to prevent said City from further regulating, licensing or taxing any person, company or corporation owning, using or operating any telephone or telegraph lines within the corporate limits of said City.

Section 5. Any person, company, or corporation, violating any of the provisions of this ordinance, or if any person, company or corporation shall attempt to erect, or shall erect any pole or wire on the streets of said city for the purpose of erecting telephone or telegraph lines, without first obtaining the consent of said City, as provided for in section two of this ordinance, then in either of the above cases, the person, company or corporation so offending, shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than ten nor more than fifty dollars, and stand committed until such fine is paid.

Ordinance No. 429 is a very lengthy ordinance closing C, D, and F. streets for the U. P. Ry. Co., and the Northwestern Ry. Co. on conditions. One of the conditions is that the U. P. Ry grant a strip 40 feet wide on the south side of its right of way for a street to be known as South Street. The Company granted the strip and the ordinance creates the street, but it is not to be opened, nor are the streets above to be deemed vacated until the mayor issues a proclamation. This proclamation awaits the completion of the new depot, which is about completed. The depot was one condition.

Endorsed: Franchise of the Postal Telegraph Cable Co. Filed Nov. 21st, 1903. S. F. Stiles, City Clerk.

659 17. Q. Mr. Wolz, following November, 1903, did the Postal Telegraph-Cable Company erect its poles and wires along the line referred to in that resolution?

A. Yes, sir.

Q. How soon afterward-?

A. I don't remember just how soon.

19 Q. Within a month or two?

A. Within a month or two, I think.

22 Q. Do your know whether or not the company has been doing business in Fremont ever since?

A. They have.

Q. Maintaining a local office?

A. Yes, sir.

23 Q. And poles and wires along the line referred to in that resolution?

A. Yes, I think so. I don't know of any change.

Mr. Dysart: The defendant objects to that question as incompetent, immaterial, irrelevant, the witness not having shown that he was qualified to testify as to the location of the line of the Telegraph Co.

Objection overruled. Defendant excepts.

Cross-examination.

By Mr. Dysart:

24 Q. Do you know of your personal knowledge at this time where the Postal Telegraph-Cable Company was first located when it first came to Fremont?

A. Yes, sir.

25 Q. Where?

Ans. The same place.

70 26 Q. Do you know where it strung its wires at that time?

A. I am very familiar with it.

27 Q. Were they where they are now?

A. Yes, sir.

28 Q. And they have remained at that same location ever since?

A. As far as I know. I don't know of any change, their offices being located in the same place naturally I would suppose they were.

Redirect examination.

By Mr. Abbott:

29 Q. Was it the Postal or the Western Union on 6th street opposite the alley there.

A. Yes.

30 Q. Which is it?

A. Was it?

31 Q. I say was it the Postal or the Western Union. Do you remember?

A. I don't remember that. I know I helped them get this location, whether at that time or not I don't know.

Mr. Dysart: Your judgment is what?

A. I would have to do a little thinking. It has been quite a while.

Mr. Abbott: Do you remember the fact that some telegraph company was located a block north of where the Postal is now located, facing the south, where Mrs. Jones' Millinery Store is located at the present time.

A. There was a company there.

33 Q. If the Postal was there a while would that be one 71 block north on the same alley.

A. Yes, I think they were there, come to think about it, for a while.

Witness excused.

CHARLES DE LA MATYR, being called on the part of the plaintiff, sworn and examined, testified as follows:

34 Q. You are city clerk of the City of Fremont?
A. Yes, sir.
35 Q. How long have you been city clerk.
A. Nearly six years.
36 Q. You occupy and office in the city hall, do you?
A. Yes.
37 Q. You have custody of all the records and files of the city clerk's office.
A. Yes.
38 Q. Do you have with you the Minutes of the mayor and council of the City of Fremont for October 30, 1903?
A. I have.
39 Q. You may turn to them.
A. (Witness does as requested.
40 Q. Calling your attention to pages 390, 291, 392, 393, 394, 395, I will ask you to state whether or not that is a record of the proceedings of the mayor and council for October 30, 1903, as the same is on file and of record in your office.
A. It is.

Mr. Abbot: I offer in evidence these pages of the record.
Mr. Dysart: These pages of the record are objected to as incompetent, immaterial, irrelevant, no proper foundation laid, not tending to prove any issue in this case.
(Overruled. Defendant excepts.)
72 Mr. Abbott: It may be stipulated that the reporter may make a copy of these pages to stand for the original?
Mr. Dysart: Yes.

Pages of this record as stated above, 390, 391, 392, 393, 394, 395, being admitted in evidence, the same are here set as follows:—(considered read.)

Council Chamber,

Fremont, Neb. Oct. 30, 1903.

Conucil met in special session and was called to order by the Hon. Mayor Wolz.
Call for special meeting was then read as follows:—

Fremont, Neb. Oct. 30, 1903.

A special meeting of the city council of the City of Fremont is hereby called to sit on Friday evening, Oct. 30, 1903, at 7.30 o'clock, to consider the application of the Postal Telegraph-Cable Company for the right and privilege to use certain streets of the city of Fremont for the construction of telegraph lines.
(Signed) GEORGE F. WOLZ,
Mayor.

Received notice of the above meeting this 30th day of October, 1903, prior to the hour fixed for said meeting.

(Signed) J. C. LEE.
A. J. FOREMAN.
D. R. FRANKLIN.
J. H. C. STOBB.
F. M. SMITH.
R. M. HERRE.
J. B. BROOKS.
A. W. MURPHY.

Roll call showed the following councilmen present: Lee, Franklin, Stobb, Murphy, Herre and Brooks (7) Absent: Smith, (1). There being a legal quorum present, the mayor declared the council open for business.

The ordinance committee reported the following resolution and moved its adoption: Whereas, the Postal Telegraph-Cable Company has applied for the consent of the mayor and the city council of the city of Fremont, Nebraska, to use certain streets for telegraph
73 wires and poles, and have promised to comply with the conditions and accept the limitaions and restrictions *and to* coupled with such consent, and also to establish and maintain a local office in said city, Therefore—

Be it resolved by the mayor and city council of the City of Fremont, Nebraska,

Section 1. That, subject to the limitations, restrictions and conditions hereinafter enumerated, the right be and is hereby granted to the Postal Telegraph-Cable Company, its successors and assigns, to set one line of poles, string wires and operate and maintain a line of telegraph, including all poles, guys, cables, wires and fixtures thereon, along and over certain streets of the City of Fremont, Nebraska, as follows, to-wit:—

Commencing at the intersection of "D" and South streets in Turner's addition, and running west on said South Street to the intersection of South and Broad Streets (said South street being as described in section 5 of ordinance No. 4295), provided that the consent of the Union Pacific Railway Company be first obtained by said Postal Telegraph-Cable Company, and this consent expressly subject to all the provisions of ordinance No. 429 of said city.

Also to string one telegraph wire or cable by the most practicable and direct route on streets and alleys from the line aforesaid to the local office of said company; said cable to be placed on the poles of either the Fremont Telephone Co., or the Fremont Gas & Electric Co., now standing in the streets or alleys to be traversed. Provided that the consent of the owners of said poles be first obtained, and that the route selected be first approved by the committee on streets and sidewalks of this city.

Section 2. Subject to all the provisions of ordinance No. 346 of the Revised Ordinances of said city.

74 Section 3. Subject to the condition that the City of Fremont may use the poles so erected for the fire alarm, police and other necessary purposes and may string wires thereon for such purposes; but such wires shall not be so placed as to interfere with the telegraph service.

Section 4. Subject to the condition that in case of fires said city may cut away, sever and remove any such poles and wires as may be necessary or expedient without being liable in damages or for compensation.

Section 5. Subject to the condition that the placing of wires and poles and all work thereon must be done as required by the committee of said council on streets and sidewalks, and such person as by said committee may be authorized to supervise such work; and said committee may and shall suspend, stop and prevent the continuance of the placing of wires and erection of poles upon any failure to comply with its directions in that behalf, and for any failure to put any street, sidewalk, curb, pavement or ground in as good condition as before such work began, immediately as the work proceeds, and for any unnecessary interference with paving, curbing, curb limit, grounds or trees.

Section 6. Subject to the condition and requirement that the committee of said council on streets and sidewalks shall see to it that, in the construction and maintenance of said lines, the paving, curb and sidewalks, sidewalk grounds and shade trees shall not be unnecessarily interfered with or materially damaged.

Section 7. Subject to all such reasonable regulations, rules and requirements as said city, by ordinance, resolutions, or otherwise, may hereafter make, adopt or prescribe.

75 Section 8. Subject to the condition that the said company shall at all times keep and save the city of Fremont harmless and indemnified from all damages by reason of the construction and operation of said lines.

Section 9. Subject to the condition that said company shall establish and maintain a local office in said city.

Section 10. Subject to the condition that the poles so to be erected by said company shall, as far as possible, be of uniform size, style, height, neat, symmetrical, properly dressed and firmly set in the ground.

Section 11. And subject to the condition and restriction that for any and every failure to comply with the conditions and requirements above, and for any and every failure to conform with the conditions and to comply with any and all requirements and regu-

lations that said city shall hereafter make within the reservations above, or within said ordinance No. 346, or within the legal powers of said city, and at the expiration of 25 years from the date hereof, unless renewed or extended, this consent shall be forfeited and cease to be operative, and said forfeiture being declared by resolution of the mayor and council of said city, and upon said 25 years having expired (without renewal of consent and extension) the owner or owners, managers and operator of said telegraph company shall within 90 days from notice of such resolution, or upon such expiration of 25 years, remove all such poles from said city, leaving the streets, alleys, curbing, sidewalks and grounds within said city in good condition, free from obstructions, holes and defects, on account of the same, or on account of such removal; and, upon failure
76 so to do, shall be liable to said city in damages, and said city may remove and convert to its use all such wires and poles, and recover against said owner or owners, manager and operator all the expense of such removal and restorations of the streets, alleys, curb, sidewalks and grounds to good and proper condition.

Section 12. All the terms, conditions, reservations, limitations and restrictions herein shall apply to and be binding upon the successors and assigns of said applicants.

Section 13. The acceptance in writing of this resolution, duly executed by the proper officers of said Postal Telegraph-Cable Company, and with the corporate seal of said company thereto duly affixed and attested, shall be filed with the clerk of said city of Fremont prior to the commencement of construction of said line, and said acceptance shall be attached to this resolution and recorded in the book in which resolutions of the City of Fremont are recorded.

(Signed) GEORGE F. WOLZ,
Mayor.

Attest:
S. F. STILES,
City Clerk.

Moved by Foreman, and seconded by Lee, that the resolution be adopted.

On the roll call, the following councilmen voted "aye" in favor thereof:—

Lee, Franklin, Stobb, Foreman, Murphy, Herre and Brooks (7). Absent and not voting, Smith (1).

Thereupon, the mayor declared the motion carried and the resolution duly adopted.

It was moved and motion prevailed that we do now adjourn.

(Signed) GEORGE F. WOLZ,
Mayor.

Attest:
S. F. STILES,
City Clerk.

77 Calling your attention to proceedings No. 11 of the Fremont City Council, pages 406, 407 and 408, I will ask you to state what these pages contain, if you know?

A. They contain a record of the proceedings of the council for that date.

41 Q. What date?

A. August 21, 1916.

42 *W.* Who kept that record?

A. I did.

43 Q. Is that attested in your own handwriting?

A. It is.

44 Q. Is that a correct record of the council meeting proceedings of that date?

A. It is.

Mr. Abbott: We offer in evidence this portion of this meeting dated August 21, 1916:

"Postal Telegraph Company. Occupation Tax.

"City Attorney.

"Councilman Harrington moved, and was seconded by councilman Wiley, that the city attorney be and hereby is directed to take action toward the collection of delinquent tax of the Postal Telegraph Cable Company.

"Roll call on the motion showed the following councilmen voting "aye" in favor thereof:—Larson, Rogers, Harrington, Wiley, Nelson, Wallace and Pierce (7). Excused, Holten (1).

"Thereupon, the mayor declared the motion carried and the city attorney so directed."

78 Mr. Dysart: The defendant objects to the introduction of this proceeding as incompetent, immaterial, irrelevant, not tending to prove any issue in the case.

Objection overruled. Defendant excepts.

45 Q. Calling your attention to Exhibits "C" and "D," state if those are records of your office that you have produced within the last day or two for this trial?

A. They are.

46 Q. Are there any further records or proceedings in your office with respect to the granting of the right to the Postal Telegraph-Cable Company to do business within the city?

A. I don't know that I can answer that. I don't recall that there is anything between; that is, between the date of 1903 and——

47 Q. These constitute the authority of the Postal Telegraph-Cable Company for doing business within the city, do they?

Mr. Dysart: Objected to as incompetent, irrelevant, immaterial and calling for the conclusion of the witness.

Objection sustained. Plaintiff excepts.

A. Yes, sir.

Mr. Dysart: I move to strike out the answer of the witness. Motion sustained. Plaintiff excepts.

48 Q. So far as the records of the office go?
A. Yes.
49 Q. You have been present in the courtroom since this trial started, have you?
A. Yes.
50 Q. And have noted the papers and records that have been introduced in evidence here with respect to the right of the Postal Telegraph-Cable Company to do business within the City of Fremont?
79 A. Yes, sir.
51 Q. Now aside from these records and data which have been introduced here, are there any other records in your office granting them any rights or privileges?

Mr. Dysart: Defendant Company objects to this question as immaterial, irrelevant, calling for the conclusion of the witness, no proper foundation laid.

Objection overruled. Defendant excepts.

A. There are none, as far as I know.
52 Q. You are familiar with the records of the office?
A. Yes: I am familiar with the records.
53 Q. You have been looking up the papers with respect to this particular matter?
A. Yes, sir.

Witness excused.

GEORGE F. WOLZ, being recalled on the part of the plaintiff, testified as follows:

Examined by Mr. Abbott:

54 Q. Calling your attention to Exhibit "E," purporting to be record of proceedings of the mayor and city council for October 30, 1903, as contained on pages 390, 395 inclusive, Book 6, I will ask you to note the signature of George F. Wolz, mayor, on page 395. Is that your signature?
A. Yes.

Mr. Dysart: Objected to as incompetent, immaterial, irrelevant.

(Overruled. Defendant excepts.)

55 Q. You may state whether or not you know that is a correct record of the proceedings of the mayor and council as of that date.
80 Mr. Dysart: Same objection, incompetent, immaterial and irrelevant.

(Overruled. Defendant excepts.)

A. Supposed to be.
56 Q. At that time you knew that it was, did you?
A. It was approved by the council.
57 Q. It is a correct record, is it?

Mr. Dysart: Same objection, incompetent, immaterial and irrelevant.

(Overruled. Defendant excepts.)

A. Yes.

Witness excused.

A. F. PLAMBECK, being produced, sworn and examined on the part of the plaintiff, testified as follows:

Examined by Mr. Abbott:

58 Q. What official position do you occupy in the city of Fremont?
A. City Treasurer.
59 Q. How long have you been city treasurer?
A. About three years and a half.
60 Q. Do you remember the exact date you became city treasurer?
A. I think May 6, 1914.
61 Q. At the time you became city treasurer, do you know whether or not the Postal Telegraph-Cable Company was doing intrastate telegraph business within the state?
A. I think they were.
62 Q. Where was their place of business.
A. On this alley here between Main and Park, on 5th street.
63 Q. Have they been doing such business ever since you have been in office?
A. Yes, sir.
64 Q. Now state whether or not they paid any occupation tax to you as city treasurer?
81 A. They paid the first year.
65 Q. What year was that?
A. The first year I was in.

Mr. Dysart: Objected to as incompetent, immaterial and irrelevant.

(Overruled. Defendant excepts.)

A. The year 1914.
66 Q. For the year commencing the last Tuesday in April, 1914.
A. Yes.
67 Q. Referring specifically to the occupation tax for the year commencing the last Tuesday in April, 1915, and for the year commencing the last Tuesday in April, 1916, have they paid any occupation tax for those two years, to you?
A. No sir, they have not.
68 Q. State what you have done towards collecting it.

A. I have notified them; wrote them; gave them written notice they were due, and they refused to pay it.

69 Q. Have they paid any part of it?

A. Not since 1914.

70 Q. Have they paid for these two years?

A. No sir.

71 Q. The same are now due and unpaid, are they?

Mr. Dysart: Defendant objects as incompetent, irrelevant, immaterial, calling for the conclusion of the witness as to whether or not they are due.

Objection overruled. Defendant excepts.

A. Yes, sir.

72 Q. Did you make any report of delinquency in payment to the mayor and council of the city?

A. I believe I made it to the city attorney. I didn't make a report to the council, but I believe I did to the city attorney.

(Cross-ex. waived.)

Witness excused.

82 Plaintiff rests.

Mr. Dysart: We offer in evidence the deposition of Mr. Edward Reynolds, taken before Richard T. Thompson, notary public Kings county, New York marked "Defendant's Ex. "I."

EDWARD REYNOLDS, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and saith as follows:

Mr. Abbott: The plaintiff objects to the introduction in evidence of these depositions as a whole, and as on file, without first ruling on objections and exceptions to specific questions and answers and ask the court to rule now upon them.

Court: Do you want the court to rule now?

Mr. Abbott: No. The court may rule when the questions are read.

Court: The objection to the deposition as a whole will be overruled and I will pass upon the exceptions as we come to them.

(Plaintiff excepts.)

Mr. Dysart proceeded with the reading of the deposition as follows:

(The numbers of the questions are the numbers appearing in the original deposition.—REPORTER.)

1 Q. You may state your name, residence, place of business, age and occupation.

A. Edward Reynolds, New Rochelle, New York; place of business, 253 Broadway, New York City; age fifty years; my occupation is that of General Manager of the Postal Telegraph-Cable Companies.

2 Q. How long have you been in the telegraph business?
A. Thirty five years.
3 Q. What office do you hold in the defendant corporation,
83 and how long have you held it.
A. General Manager and formerly auditor.
4 Q. You may state whether or not you are familiar with the business of the defendant corporation?
A. I am.
5 Q. Mr. Reynolds, it appears from the pleadings in this case that the defendant corporation paid a license fee to the plaintiff, the city of Fremont, for the years 1905 to 1910, and thereafter refused to pay, excepting for the year 1914. Will you explain why this was done.

Mr. Abbott: The City of Fremont, the plaintiff, objects to the question as incompetent, immaterial, irrelevant, calling for the conclusion of the witness, no sufficient foundation laid therefor, and it assumes a fact not proven. The witness shows no familiarity whatever with the payment.

Objection overruled. Plaintiff excepts.

Mr. Abbott: I might suggest at this time that the entire deposition is along this line, and it is argumentative in some cases and cites legal authorities, and I object to it on that account, and I have filed a motion to strike this answer as incompetent, immaterial, irrelevant, no sufficient foundation laid, and that it states the conclusions of the witness and is argumentative.

Court: It seems to be subject to that objection; but, however, I think I will let the answer go in and try to take care of it with an instruction.

(Plaintiff excepts.)

A. The reason why we paid for a few years was because litigation is expensive, and from year to year we concluded to pay rather than to incur the loss of time and trouble and expense of litigating
84 over $60, especially as litigation would involve considerable preparation in the way of figures, testimony, depositions, etc., besides the lawyer's expense, court costs, etc. Hence, every year, although we realized and believed that this $60 a year at Fremont was exorbitant and illegal from any point of view, yet rather than litigate we continued to pay from year to year until 1911, when we absolutely refused.

Another reason was, that these city license fees are apt to be copied by one city from another, and while we might not be inclined to litigate for one or two cities, yet when the number increases, as it has been during recent years, it becomes absolutely necessary for us to call a halt and litigate; because otherwise, our income would be swept away, especially in these days when, in addition to regular ad valorem taxes, we have to pay an income tax with a possible excess profit tax, besides generally a license fee to the state itself on our so-called franchise or privilege to do business.

The question of taxation has become a very important one in our expenses, and it has become necessary to refuse to pay what we con-

sider illegal taxes such as these city license fees. For all of these reasons, we stopped paying this license fee in 1910. As to 1914, that payment was a mistake of our staff and was not passed upon by me. It slipped through the tax department in some way or other and was paid, although I believe it was paid under protest. When it is considered that we pay hundreds of these municipal license fees in different parts of the country, it is not strange that such accidents as this should happen.

Mr. Abbott: The plaintiff moves to strike out the answer to Int. 5 as incompetent, immaterial, irrelevant, no sufficient foundation laid, and because it states the conclusions of the witness and it is argumentative.

85 Court: A great deal of your objection is correct; but the rule is, if any part of the answer is sound, of course, the objection must be overruled as to all of it. Motion to strike is overruled.

(Exception.)

6 Q. Mr. Reynolds, the claim is made in the petition in this case that the right of your company, the defendant, to do business in the City of Fremont, the plaintiff, comes from the ordinance of that city. You may state the facts in regard to that.

Mr. Abbott: We object to Int. 6, for the reason that the same is incompetent, immaterial and irrelevant. It calls for the conclusion of the witness. There is no sufficient foundation laid, and there is no proof whatever that the witness has any familiarity with the facts with respect to which he is asked to testify.

Objection sustained. Defendant excepts.

Mr. Dysart: The defendant offers the answer to Int. 6 which has been excluded.

Answer to Int. 6 is as follows:

A. Our right to do a telegraph business in Fremont comes from two sources, irrespective of the ordinance of that city. In the first place, our company has accepted the Post Road Act, of Congress of July 24, 1866, by filing its written acceptance with the postmaster general of the United States, as provided in that Act; and the Supreme Court of the United States has held that any telegraph company which has accepted that Post Road Act of Congress cannot be excluded even by a state from doing a telegraph business in that state. That decision was Western Union Telegraph Co., vs. Massachusetts, 125 U. S. 530.

Mr. Abbott: We object to the offer of the answer for the same reasons urged to the question.

86 Objection sustained. Plaintiff excepts.

7 Q. In that connection, I show you a document and would ask you what it is.

Mr. Abbott: Plaintiff objects to Int. 7 for the reason that it is incompetent, irrelevant and immaterial, no sufficient foundation laid.

Objection overruled. Plaintiff excepts.

A. It is the certificate of the postmaster general of the United States showing that the defendant company accepted the Post Road Act of Congress on April 1st, 1903.

Mr. Cook: I offer in evidence this certificate of the postmaster general.

Received in evidence and marked defendant's exhibit No. 1.

Mr. Abbott: Plaintiff objects to Exhibit 1 offered in the deposition as incompetent, immaterial and irrelevant, no sufficient foundation laid.

Objection overruled. Plaintiff excepts.

8 Q. Mr. Reynolds, I wish you would now explain the second fact which authorizes you to do business in Fremont, irrespective of the Fremont ordinance.

Mr. Abbott: The plaintiff objects and except- to Int. 8 of the deposition as incompetent, immaterial and irrelevant, calling for the conclusion of the witness, no sufficient foundation laid; and it does not appear that the witness has any familiarity whatever with respect to the matter about which he is asked to testify.

Court: The form the question is in calls for the conclusion of the witness. Technically, the objection ought to be sustained. But I will overrule the objection at this time.

(Plaintiff excepts.)

87 A. The defendant is a corporation organized under the laws of Nebraska, and the charter of the defendant including, as it does, the rights and obligations of the Nebraska statutes, obligates us to furnish telegraph service in Fremont, as well as other cities in Nebraska to which our lines extend. Any refusal to do so would subject our charter to forfeiture at the instance of the State of Nebraska, and to law suits by persons whose messages were offered to us for transmission, if we refused to transmit them.

Mr. Abbott: Plaintiff objects to the answer to Int. 8 as incompetent, irrelevant and immaterial, giving the conclusions of the witness and not stating facts.

Court: I guess that is in harmony with what the law is. It won't do any harm.

(Plaintiff excepts.)

9 Q. I ask you whether this is a copy of the certificate of incorporation of the defendant company.

A. It is.

Mr. Abbott: Plaintiff objects and excepts to Int. 9 just read as being incompetent, immaterial and irrelevant, leading and suggestive and no sufficient foundation laid.

Objection overruled. Plaintiff excepts.

A. It is.

Mr. Cook: I offer in evidence this certified copy of the defendant's certificate of incorporation, dated April 11, 1903, as amended October 18, 1905. Defendant's Exhibit No. 2.

Mr. Abbott: Plaintiff objects and excepts to the introduction in evidence of the certificate of incorporation, or a copy of it, Exhibit 2, immediately following the answer to Int. 9, for the same
88 reasons, incompetent, irrelevant, immaterial. It is a purported copy, it is not the original, it is not the best evidence, no sufficient foundation has been laid for its introduction; and, for the further reason, that the same is not on file in this action, and this action is now under way; it is not attached to the deposition.

Mr. Dysart: I ask leave to file these exhibits now. I have them in my possession.

Mr. Abbott: Were they sent to the clerk or you?

Mr. Dysart: They were sent to me.

Objection overruled. Plaintiff excepts.

Mr. Dysart: We will have the clerk file them today.

Mr. Abbott: I would like to have the record show that the exhibits sought to be introduced by the defendant are now produced by counsel for defendant and were not transmitted by the notary, and they have been in the custody and control of defendant's attorney up to this time, and the plaintiff objects to defendant's counsel filing the same now, or the introduction of them in evidence; not having been on file before the commencement of the trial, not having been certified to and transmitted by the notary who took the deposition.

Court: If there was nothing but the deposition to sustain them, I would sustain the objection; but they are properly certified to and I will overrule it.

Plaintiff excepts.

Exhibits "1" and "2" admitted in evidence are here set out as follows:

89 10 Q. There is a further claim in the petition in this suit that the defendant having paid this license fee for a series of years cannot now question its legality as to subsequent years. What have you to say as to that.

Mr. Abbott: Int. 10 is objected to as incompetent, immaterial and irrelevant, calling for the conclusion of the witness, calls for opinion-evidence and not for facts, and no sufficient foundation has been laid.

Objection sustained. Defendant excepts.

Mr. Dysart: The defendant offers in evidence the answer contained in the deposition to question No. 10.

Mr. Abbott: Plaintiff makes same objection.

Objection sustained. Defendant excepts.
Answer to Int. 10 is as follows:

A. I am not a lawyer, and that is, to a certain extent, a legal question, but from the practical telegraph standpoint the claim would seem to be absurd. For instance, the business of a telegraph company in any particular town varies from year to year. Sometimes the business of the town declines and the telegraph business goes down with it. At other times, the business varies as the industries vary, and the telegraph business equally varies. Now that which might be a reasonable license fee in a prosperous town might become a very unreasonable and illegal license fee if the business of that town should go down. We have many controversies with municipalities throughout the United States in regard to license fees, and I never before have heard of such a claim of estoppel as is here presented. I could understand it if it pertained to the years for which we have already paid; but, of course we are not claim-
90 ing repayment for these years.

11 Q. Mr. Reynolds, you may state whether this particular telegraph line of the defendant which runs through Fremont, the plaintiff, handles government messages and interstate message and international messages.

A. It certainly does handle all of these classes of messages and also handles intrastate messages. I would also add that interstate telegrams constitute a part of interstate commerce and are interstate commerce in themselves.

12 Q. Mr. Reynolds, I believe it is claimed in this suit, as it has been in other suits, that your company is at liberty to discontinue doing an intrastate telegraph business, if it wishes, and thus be under no obligation to pay the $50 license fee. What have you to say as to that.

Mr. Abbott: Plaintiff objects and excepts to Int. 12 as incompetent immaterial and irrelevant, calling for the opinion of the witness, calling for opinion-evidence, and no sufficient foundation has been laid.

Objection sustained. Defendant excepts.

Mr. Dysart: The defendant offers in evidence the answer to Int. 12 excluded in the deposition.

Mr. Abbott: Plaintiff objects for the same reason and for the further reason that the answer states the conclusions of the witness and usurps the province of the court.

Objection sustained. Defendant excepts.
Answer to Int. 12 is as follows:

A. That is largely a legal question, except that I would say that the defendant company is a Nebraska corporation, as I have already testified, and is bound to comply with the statutes of Nebraska. These statutes would subject us to punishment for a mis-
91 demeanor if we declined to transmit intrastate messages. If you will look at the statutes of Nebraska for 1883, P. 327,

you will find that is so, and, also, the statutes for 1913, at page 184. In fact, there is a specific statute bearing on this subject, namely, 7408, Article I., Section 14, of the Revised Statutes of Nebraska, 1913, which reads as follows:

"Every telegraph company engaged in the business of receiving "and transmitting messages or telegrams in this state, whether incor- "porated under the laws of this state, or the laws of any other state "or territory, or by virtue of the laws of the United States, shall, "when required by any person or persons to transmit any message or "telegram from any point in this state to any other point in this "state, and over lines owned, operated and controlled by such com- "pany, receive and transmit such message or telegram."

Then there is another statute passed in 1883 in Nebraska, and found on page 323 of the laws of that year. That statute is practically the same as the old New York statute on the same subject. The contention that we may legally discontinue our intrastate telegraph business is absurd. We would soon find ourselves in trouble and our charter taken away at the instance of the attorney general of the state, and we would be put out of business.

13 Q. Mr. Reynolds, I will now take up the difficult subject of the financial results of the operations of your Fremont office for the years 1914 and 1915, which are involved in this suit; and, before I ask you how you propose to divide the expense of your Fremont office, between interstate traffic and intrastate traffic, and also what proportion of the overhead expense your propose to apportion to the intrastate part of the business at your Fremont office, I wish to ask you a few questions as to your qualifications to work out a proper theory in calculating whether this $60 at Fremont, if paid, would have to be paid out of the interstate part of the business or would be paid out of the intrastate part of the business.

Mr. Aldeat: Plaintiff objects to Int. 13 as incompetent, immaterial, irrelevant, argumentative, not calling for or anticipating an answer, and no answer given.

Court: If there is no answer given, there is no error.

Mr. Dysart: As a part of the same question the deposition continues:

Q. 14. "In what capacities have you served in the telegraph business during the last thirty five years. I suppose that is to be considered a part of the same question, but they are numbered 13 and 14.

Court: The last part seems to be proper. He may answer.

Plaintiff excepts.

A. I was a messenger, telegraph operator and office manager, about eleven years. I was chief clerk to a district superintendent, an operating officer, for a period of about six years. I was chief clerk to the vice president having charge of the lines and offices, and the handling of traffic over the entire postal system for two years. I was general auditor for the postal system for about twelve years. I

was vice president and assistant to the president for about five months, and have been vice president and general manager in charge of all operations down to and including the present time, a little over four years.

93 15 Q. As messenger, telegraph operator and office manager, you became familiar with the methods of collecting, forwarding, accounting and estimating the expense connected with telegrams.

Plaintiff objects as leading and suggestive. Objection overruled. Plaintiff excepts.

A. I did.

Q. State whether or not, as chief clerk to a district superintendent, you were required to supervise all details of management in cities, and state further what your duties were in such position.

A. I was required as chief clerk to a district superintendent to supervise all details of management in cities and towns within a specified territory, this territory being bounded on the north by the Dominion of Canada, on the east by an imaginary line ending at Greenfield, Mass. on the west by an imaginary line ending at Wilkesbarre, Pa., and on the south by the Atlantic Ocean, the City of New York being included in the territory described. As such chief clerk of a superintendent it was also necessary for me to be familiar with the methods of securing telegraph business and of handling it afterwards, and of the cost of handling and with the accounting and statisticial reports of the company's agents.

17 Q. State what your duties as chief clerk to the vice president were and what they required you to do.

A. As chief clerk to the vice president, my duties required me to pass upon all questions relating to the movement of telegraph traffic and the cost. I was also required to analyze all office and statistical reports sent in by agents in the field relating to the financial results in cities, towns and districts under their supervision, and assist the executive officers in controlling the expenses and in de-

94 veloping the company's policies.

18 Q. State what your duties were as general auditor of the company and what they required you to do.

A. As general auditor of the company, I had charge of all the books of account for the entire postal system and the preparation of all statistics required me, as an account officer, and it was my duty to study the operating results in the different parts of the company's system in connection with my statistical reports and to analyze the results shown; point out the objectionabl- spots and assist the executive officers in arranging methods for the elimination of extravagance in management and in improving the method of conducting the business in all parts of the country.

It was in my capacity as auditor that as far back as 1905 or 1906 I personally arranged and introduced a uniform system of accounting for all telegraph offices in the Postal System, and visited the principal offices of the company throughout the country introducing that system, and by such personal visits acquired an intimate knowl-

edge of local conditions and the methods employed moving telegrams from the place of origin to their destination.

I might further add, that in 1912, while still acting as auditor of the company, I caused to be introduced into the large operating departments a system of cost accounting to be applied directly to the labor charge for the handling of telegrams, and the introduction of this cost system made it necessary for me to be familiar with the details connected with the handling of telegrams, particularly those details affecting the cost of the same.

19 Q. State what your duties were as vice president and assistant to the president, and what those duties required you to do.

95 A. As vice president and assistant to the president, I spent upwards of one year visiting agents in the field, and in the study of methods connected with the upbuilding of the business of the Postal System, and in handling that business in the most advantageous manner, and that necessarily called for a study of the subject and of operating conditions and factors that enter into the expense of handling cablegrams and telegrams.

20 Q. State what your duties were as vice president and general manager, and what those duties required you to do.

A. As vice president and general manager during the past four years, I have devoted my entire time to the study of the telegraph business with a view of placing its management upon a more scientific basis, and had to pay close attention to the assignment of the company's wires and the means employed to collect and transmit telegrams and cablegrams to speed up the service at the least cost, and hence have studied every item of the cost.

My knowledge and experience justifies me in saying that the most equitable method of determining the proper proportion of the expense incurred in and properly chargeable to intrastate business and interstate business is, to divide the expense according to the ratio which exists between the interstate and intrastate receipts. Such a division of expense between interstate and intrastate receipts is the method which was accepted and approved by the supreme Court of Georgia in the case of the Postal Telegraph-Cable Company vs. City of Cordele, reported in 141 Ga. 658, decided in 1914. That mode of ascertaining the proper division between interstate receipts and intrastate receipts, as to expenses, local and overhead, originated with me and was worked out carefully by me after a long study.

96 Mr. Abbott: Plaintiff moves to strike out the 2nd paragraph of the answer as not responsive, and because it is argumentative, usurping the province of the court and no sufficient foundation has been laid.

Court: I think it may stand for what it is worth.

Plaintiff excepts.

21 Q. Will you kindly explain the Cordele plan of dividing expenses between intrastate and interstate business.

Mr. Abbott: Plaintiff objects and excepts to Int. 21 for the reason that it is incompetent, immaterial and irrelevant, not in issue, no sufficient foundation laid.

Objection overruled. Plaintiff excepts.

A. In order to do that it will be necessary to show in some detail how telegraph traffic is handled.

The operating cost for handling telegraph traffic varies according to the operating methods followed by the office originating the message. The methods are determined by the wire assignments.

Some offices (and they are usually the offices that originate the largest amount of business) have direct wires to large commercial points outside of the state over which all interstate messages are sent by one transmission.

Some offices have only local wires and are compelled to send their interstate messages to a large commercial center within the state to be forwarded over direct wires from that point to points outside the state.

Some offices work direct with a number of offices within the state.

Some offices have no connection with any office except the
97 large commercial center referred to above, to which all messages are sent to be forwarded.

The wages paid to office managers, operators, clerks and messenger boys, is the largest item in the operating expenses of a telegraph company, and telegraph men experienced in the handling of telegraph traffic know that the more often a message is handled the greater its cost.

Mr. Abbott: Plaintiff objects and excepts to the answer to Int. 21 and moves to strike the same for the reason that it is incompetent, immaterial and irrelevant not in issue, no sufficient foundation laid.

Objection and motion overruled. Plaintiff excepts.

22 Q. Mr. Reynolds, I wish you would explain about the labor cost in the method of handling both intrastate and interstate messages.

Mr. Abbott: Plaintiff objects to Interrogatory 22 for the reason that it is incompetent, irrelevant, immaterial, no sufficient foundation laid.

Objection overruled. Plaintiff excepts.

A. A telegraph operator handles both kinds of messages indiscriminately as they come to the office, and with the same instrument and the same Morse alphabet and the same wire; and, in fact, the same in every way, and the labor cost, therefore is the same each time a message is handled, whether it is an interstate message or an intrastate message. The total cost of a message is determined by the number of times it is handled.

Mr. Abbott: Plaintiff urges same objection to the answer to Int. 22. Objection overruled. Plaintiff excepts.

23 Q. What have you to say about the expense for collecting both kinds of messages.

98 A. The expense for collecting both kinds of messages is the same whether collected by messenger or by telephone or if filed

in our office over the counter; because both kinds of messages are handled by messengers and clerks indiscriminately.

24 Q. Is the same true with respect to the cost of delivering intrastate and interstate messages.

Mr. Abbott: Objected to for the same reasons and for the further reason that it is leading.

Court: It is leading, but it is overruled.

(Exception.)

A. It is.

25 Q. What have you to say with respect to interstate messages originating at the large offices in Nebraska.

Mr. Abbott: Int. 25 is objected to by plaintiff as incompetent, immaterial and irrelevant, no sufficient foundation laid.

Objection overruled. Plaintiff excepts.

A. The interstate messages originating at the large offices in Nebraska (all of which have direct wire connections to points outside the state) are disposed of by the originating office with one transmission.

Mr. Abbott: The answer to 25 is objected to for the same reason, and I challenge the court's attention to the lack of foundation. This man is in New York, and he cannot know these things.

Objection overruled. Plaintiff excepts.

26 Q. How about intrastate messages.

A. Intrastate messages originating at offices in the state of Nebraska, when destined to other offices with which the originating office has direct connection, are handled by operators twice.

99 But if the office of origin is not connected by direct wires with the office of destination for the interchange of intrastate messages, such messages are sent to an intermediate point, a relay point, to be forwarded to the office of destination. Such messages are handled in the operating department four times.

Interstate messages originating at offices in the state of Nebraska having no direct connection with points outside the state are sent to the nearest large commercial center, a relay point, to be forwarded by that office to the office of destination, and such messages are handled four times:

1. Sent from office of origin to intermediate point.

2. Received at intermediate point.

3. Transmitted to outside point by intermediate point.

4. Handling of such interstate message outside the state Intrastate messages destined to a place within the state not in direct communication with office of origin must be re-handled at an intermediate point, and such messages are handled four times.

1. Sent by office of origin to intermediate point.

2. Received at intermediate point.

3. Transmitted by intermediate point to office of destination in state.

4. Received at office of destination in state.

27 Q. By what method is the larger portion of the interstate business done by the Postal Telegraph-Cable Company of Nebraska, at Fremont, Nebraska?

Mr. Abbott: Objected to for the last reason stated, and as incompetent, immaterial and irrelevant, no sufficient foundation laid, and for the further reason that it assumes facts not proven.

100 Objection overruled. Plaintiff excepts.

A. The larger portion of the interstate business done by the Postal Telegraph-Cable Company of Nebraska, at Fremont, Nebraska, is the transmission of messages between Fremont and large commercial points outside of the state of Nebraska. This interstate business at Fremont is relayed—in other words, repeated—at Omaha as to eastern business; and at Denver, Colorado, as to western business. Each message involves two handlings, and hence interstate messages to and from Fremont would be handled four times at least, and most of them more than that, according to the number of additional relays.

28 Q. Mr. Reynolds, is there any other labor cost in connection with the handling of telegrams in addition to what you have just named?

Mr. Abbott: That question is objected to as incompetent, immaterial, irrelevant, no sufficient foundation laid.

Objection overruled. Plaintiff excepts.

A. The above relates to the cost for labor in operating rooms for operators and clerks; but there is another large labor cost in connection with the handling of telegrams, and that is the cost of collecting and delivering them by messenger boys.

An intrastate message is collected by messenger at one point and delivered by messenger at another point within the state, and we have a labor cost for two handlings by messenger.

29 Q. What have you to say with respect to the division of expense for office supplies, etc?

Mr. Abbott: Plaintiff makes same objection as to 28.

101 Objection overruled. Plaintiff excepts.

A. Again it is necessary to divide the expense for office supplies on a percentage basis, followed by the Cordele plan; because our largest issue of blank forms is for sending blanks that are distributed freely to the public; and their cost and the cost of all other forms should be divided according to their use, which is the same per message, whether intrastate or interstate.

30 Q. How about office rents.

Mr. Abbott: Same objection as to Int. 28, incompetent, immaterial, irrelevant, no sufficient foundation laid.

Objection overruled. Plaintiff excepts.

A. The expense for office rents is another item than can only be equitably divided on a percentage plan; because the space used for telegraph offices and the number of seatings for its employes is governed by the volume of business transacted in each place, and the office space should be divided pro rata according to the volume of intrastate and interstate business handled.

31 Q. State whether or not another item of expense is construction and maintenance of lines.

Mr. Abbott: Same objection as to Int. 30.

Objection overruled. Plaintiff excepts.

A. A part of the expense is incurred, of course, in the construction and maintenance of lines, and the same line is used in part for interstate and intrastate messages. These interstate messages, however, which are handled by the telegraph company are not transmitted on the average over a greater distance on the telegraph
102 company's lines than intrastate messages, this being due to the zigzag method in which intrastate messages are necessarily handled as compared with direct routes traversed by interstate messages.

32 Q. Does the relation between the expense for handling interstate messages and intrastate messages, on the one side, and the rate charged for the same, on the other, change the application of the Cordele plan?

Mr. Abbott: Objected to as incompetent, immaterial, irrelevant and no foundation laid for the testimony.

A. It does not.

33 Q. Kindly illustrate.

Same objection, same ruling and exception.

A. For instance, on a telegram or cablegram from Fremont to India, the entire toll would have to be divided between at least three different companies, namely, the Postal Telegraph-Cable Company of Nebraska, the Commercial Cable Company in the Atlantic Ocean, and the English Company having lines from London to India, and in these interstate or international messages the division of toll results in the Postal Telegraph-Cable Company of Nebraska getting only about as large a toll for its part of the work on an interstate or international message as it gets on its intrastate messages because it keeps the whole of the latter but has to give up a very large part of the former to connecting lines.

34 Q. Mr. Reynolds, what have you to say with respect to overhead and supervising expenses.

Same objection, same ruling, and exception.

A. The experience of the telegraph company spread out over many years has shown that the overhead and supervising expense
103 rises and falls in about the same proportion as the gross revenues, and the only practical method of dividing this overhead expense is by making the interstate or intrastate traffic bear such share as that particular class of traffic bears to the total amount of traffic handled.

35 Q. Mr. Reynolds, kindly explain about the labor cost on intrastate messages as compared with the same cost in interstate messages.

Plaintiff makes same objection, same ruling, Exception.

A. In the case of offices having direct wires to points outside the state to which all interstate messages are forwarded by one transmission, the labor cost on all intrastate messages originating at such offices is from two to three times greater than on an interstate message.

36 Q. Say whether or not the Cordele plan favors the intrastate business in any way.

Same objection, same ruling and exception.

A. The Cordele plan favors the intrastate business by assessing it with a smaller proportion of the operating costs than it should be required to bear; but as the actual cost cannot be established the Cordele plan has been accepted as a practical and equitable method. It gives a division of the total cost of operatings that is approximately correct and not unduly burdensome on either class of business.

37 Q. Mr. Reynolds, do you care to say anything with respect as to whether you think telegraph companies derive any profit at all from intrastate telegrams.

Mr. Abbott: Plaintiff objects to that question for the reason that it is incompetent, immaterial, irrelevant, no foundation laid
104 and because calling for the opinion of the witness.
Objection sustained. Defendant excepts.

Mr. Dysart: The defendant offers in evidence the answer to question 37, reading as follows:—

A. Telegraph companies doubt greatly whether they derive any profit whatsoever from the transmission of intrastate telegrams; inasmuch as most of those messages bear only a 25-cent toll. A representative of the Western Union Telegraph Company testified a few years ago, before the public service commission of New York that his company believed that it lost money on every 25-cent telegram. At a hearing before the Public Service Commission of Massachussetts, on November 24, 1915, the traffic superintendent of the Western Union Telegraph Company testified that money is lost by that telegraph company on all 25-cent messages.

I am prepared to state that the Postal Telegraph-Cable Company of Nebraska incurs an actual loss on these intrastate telegrams, and

that any mode of figuring by which the expenses are apportioned between interstate telegrams and intrastate telegrams, according to the comparative receipts from these two sources, is decidely in favor of the intrastate telegrams, and that, as a matter of fact, the intrastate telegrams should bear a much larger proportion of the expenses than is indicated by its volume of receipts as compared with the volume of interstate receipts; inasmuch as an intrastate telegram is handled by operators on the average as many times at least as an interstate telegram.

During the year 1914, the Postal Telegraph-Cable Co. of Nebraska handled 171,925 messages. Within the City of Fremont
105 during the same year 2,256 messages were handled. To establish the proportion of the overhead expense chargeable to messages handled in Fremont I have taken 2,256/171,925 of the various items making up the overhead operating expenses. I submit below a statement showing clearly how the average cost per message is obtained for the year 1914. Also for the year 1915:—

Year 1914.

Intra-commercial		71.79	
Intra-Government		.....	
Intra-press		.81	
			72.60
Messages sent intra	292		
Messages sent inter	1,917		
Cables	23		
Money transfers	24		
	2,256		
Average toll on intrastate messages			.2486

Local Expenses.

Wages, Comm., Msgrs & Phone	1,013.28÷2256=	.4491
Rent, light, heat, frt., exp.	247.18÷2256=	.1096
Stationery & Postage	16.15÷2256=	.0072
Office equip. & battery	3.27÷2256=	.0014
Miscellaneous	7.51÷2256=	.0033
		.5706

Overhead Expenses.

General Law Expenses	2256				
	171925	of	174.72=	2.29÷2256=	.0010
Rentals for leased wires.	"	"	511.00=	6.70÷2256=	.0030
Maintenance lines	"	"	8,323.41=	109.22÷2256=	.0484
Sals. & Exps. Genl.	"	"	2,952.86=	38.75÷2256=	.0172
Officers	"	"			
Engineering expns.	"	"	625.88=	8.21÷2256=	.0036 .0732

186 Summary.

Average toll on intrastate messages.....	.2486	
Local expense as shown above.....	.5692	
Overhead " " " "	.0828	
	.6438	
Loss per message.....	.3952	
Total loss on intrastate messages 292×.4034.....		$115.40

Year 1915.

Intra-Commercial	77.53		
Intra-Government	.....		
Intra-press	3.63		
		81.16	
Messages sent intra.....	307		
Messages sent inter.....	1931		
Cables	7		
Money Transfers	21		
		2266	
Average toll on intrastate messages.....			.2644

Local Expenses.

Wags., Comm., Msgrs., phone...	1,005.70 ÷ 2266=	.4438	
Rent, light, heat, frt., exp.....	250.38 ÷ 2266=	.1105	
Stationery & Postage.	10.40 ÷ 2266=	.0046	
Office equip. & Battery.....	25.82 ÷ 2266=	.0114	
Miscellaneous	9.89 ÷ 2266=	.0043	
			.5746

Overhead Expense.

Genl. Law Expense	2266 / 179324	of	174.72=	2.20 ÷ 2266=	.009
Rentals for leased wires.	" "		441.43=	5.86 ÷ 2266=	.0026
Maintenance of lines.....	" "		12458.90=	157.43 ÷ 2266=	.0695
Sal's & Ex. Genl. Off'rs.. ...	" "		3165.08=	40.00 ÷ 2266=	.0176
Engineering exp...	" "		580.23=	7.33 ÷ 2266=	.0032
					.0938

Summary.

Average toll on Intrastate messages.....	.2644	
Local Exp. as shown above.....	.5732	
Overhead exp " "	.1017	
	.6684	
		.4040
Total loss on intrastate messages 307×.4165.....		$124.02

107 As pointed out above, an intrastate message costs more than an interstate message, and in applying the average cost under the method described above I am favoring intrastate messages.

The gross revenue from intrastate messages handled in Fremont, Nebraska, during the year 1914 amounted to $72.60. In the year 1915, the gross revenue from intrastate messages handled in Fremont, Nebraska, amounted to $81.15.

The number of intrastate messages handled during the year 1914 was 292. And in the year 1915, 307.

The average toll collected per message for intrastate messages in 1914 was 24.86 cents, and the average toll collected per message in 1915 was 26.44 cents.

The loss on intrastate messages during the year 1914 was the difference between the average cost per message of 64.36 cents and the average toll collected per message of 24.83, or 39.52 cents on 292 messages, or $115.40.

The loss on intrastate messages during the year 1915 was the difference between the average cost per message of 66.84 cents and the average toll collected per message of 26.44 cents, or 40.40 cents on 307 messages, or $124.02.

EDWARD REYNOLDS.

Sworn to before me this 22nd day of May, 1917.

[SEAL.] RICHARD T. THOMPSON.

(Certificate.)

Mr. Abbott: Plaintiff objects to the offer of the answer to Int. 37 for the same reasons as urged to the interrogatory—incompetent, immaterial, irrelevant, no foundation laid and because giving the opinion of the witness.

108 Mr. Dysart: This answer really included his complete explanation and computation of the plan that he has been following.

Court: I don't think it makes very much difference about the plan, but it is a question of the figures.

Mr. Dysart: These are the figures.

Court: The question don't call for the figures. The answer may include the figures. Are the figures that are given very material in this case?

Mr. Dysart: It is a computation of the receipts and disbursements for the years 1914 and 1915, and showing the proportion of expense of that year that should be attributed to each class of business, interstate and intrastate.

Mr. Abbott: The defendant having just completed the reading of the entire answer to the question number 37 of the deposition of Edward Reynolds, the plaintiff objects and excepts to the answer and moves to strike the same out as incompetent, irrelevant, immaterial, and not responsive to the interrogatory and no sufficient foundation has been laid therefor.

Court: I don't think it is responsive to the interrogatory, but I rather think it is material, and I will let it stand. Overruled.

(Plaintiff excepts.)

Mr. Dysart: Then I come to the deposition of Mr. Joseph J. Cardona, which I introduce in evidence and now read, taken before the same notary:

JOSEPH J. CARDONA, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and saith as follows, viz:

1 Q. You may state your name, residence, business, age and place of business.

A. Joseph J. Cardona, residence Brooklyn, N. Y.; business address, 253 Broadway, New York City; occupation, telegraph business.

3 Q. If you are an officer in the defendant corporation—Postal Telegraph-Cable Company of Nebraska, what office do you hold?

A. Treasurer.

4 Q. By the way, I notice that the name of the defendant, as it appears in the pleadings, omits the words "of Nebraska." What is the correct, full name of the defendant.

A. Postal Telegraph-Cable Company of Nebraska.

Mr. Aldatt: Plaintiff objects to interrogatory #4 as incompetent, irrelevant and immaterial. The petition in this case is against the Postal Telegraph-Cable Company as a corporation, and the Answer is framed the same way, so I object to the question as incompetent and immaterial.

Objection overruled. Plaintiff excepts.

5 Q. You may state what your duties are as treasurer of the defendant.

A. I perform the usual duties of a treasurer of a corporation and have charge of the books and accounts, setting forth in detail all the business and transactions of the company, the income, expenditures, and, in fact, have charge of all the books of the company, excepting the books which the secretary has charge of, namely, the minute books of directors' meetings and stockholders.

6 Q. Have you those books with you here today?

A. No. They at present are on the way to New York by express from Nebraska, where they are regularly kept. It is only occasionally that they are brought to New York and are then immediately returned.

(Adjournment taken until May 21st, 1917.)

7 Q. Mr. Cardona, have the treasurer's books and papers arrived from Nebraska?

A. Yes, sir.

8 Q. Have you them with you?

A. Yes, sir.

9 Q. What is your system of bookkeeping? What books do you keep?

A. I keep three books for every year, namely, a cash book, a journal and a ledger. I have before me those three books for the years 1914 and 1915.

10 Q. You do not keep any day books or blotter?

A. No, sir.

11 Q. What is your system of posting from one book to the other?

A. The other book, of course, contains all entries in regard to cash and is posted direct into the ledger. The journal contains the usual entries of a journal, namely, all accounts of the company, and, of course, is posted into the ledger. The ledger contains the combined accounts of the two other books.

12 Q. You may state whether these are your treasurer's books kept by you as treasurer of the defendant?

A. They are.

13 Q. They are the books of the company?

A. Yes, sir.

14 Q. State whether they have been regularly kept by you as treasurer.

A. Yes, sir.

Mr. Abbott: This question is objected to as leading, suggestive, incompetent, irrelevant, immaterial.

111 Objection overruled. Plaintiff excepts.

15 Q. You may state whether you know that the entries in these books are correct records of the transactions they profess to record?

A. Yes, sir.

16 Q. You may also state whether these books have been in actual and continuous use by you and by the defendant corporation as a guide and authority for the officers of the corporation.

Mr. Abbott: Plaintiff objects and excepts to interrogatory 15 as incompetent, immaterial, irrelevant, suggestive, no sufficient foundation laid; and it appearing from the preceding question that the witness is a non-resident and located in New York and that these books are kept in the state of Nebraska.

This treasurer in New York is absolutely incompetent to identify the Nebraska books. He testified in the early part of the deposition that the books had not arrived yet from Nebraska where they were kept.

The same objection to Int. 16.

Court: Still, I rather think it goes to the weight of the evidence. They follow out one system, the evidence shows, and he is familiar with that system. It goes to the weight of it. Of course, he did not see the individual entries made.

(Plaintiff excepts.)

A. Yes, sir.

17 Q. You may also state whether these books have been kept in

the regular course of the business for the purpose of preserving the record of the facts contained in them.

A. Yes, sir.

(Same objection, ruling and exception.)

18 Q. You are prepared to testify that these books contain true and accurate accounts of all transactions of the defendant?

A. They do.

112 Plaintiff makes same objection and also the objection leading and suggestive.

Objection overruled. Plaintiff excepts.

Mr. Cook: I ask the notary public to mark for identification these six books, marks to be on the first blank page of each book.

Marked for identification "Defendant's Exhibits, May 22nd, 1917, A, B, C, D, E, F.

Mr. Abbott: I object to the introduction in evidence of these exhibits referred to immediately following Int. 18 as incompetent, immaterial and irrelevant; they do not tend to prove or disprove any issue in the case; there is no sufficient foundation laid, and for the reason that these exhibits were not on file or of record in this court as a part of the deposition, nor were they transmitted with them, and they are not at this moment a part of the records and files of this court, and the plaintiff asks leave in this connection to call to the stand the clerk of the court.

Court: Well, you may do that.

P. T. Mitterling, being called by the plaintiff, sworn and examined, testified as follows:

Examined by Mr. Abbott:

Mr. Dysart: The defendant objects to the introduction of this evidence, for the reason that this raises a question and objection to the deposition not made in writing and filed before the beginning of the suit.

Mr. Abbott: The defendant is attempting to bring into court records and books that are not and have not been on file in this
113 case, and until the production of which the plaintiff could not make its objection. I propose to show by the clerk of this court on the witness stand that there are no such books on file in his office nor a part of the record thereof.

Court: I presume the attorney will stipulate for that.

Mr. Dysart: Oh, yes, the filing marks will show that, the absence of filing marks.

Objection overruled. Defendant excepts.

73 Q. Calling your attention to the jacket marked "Filed May 25, 1917" purporting to be depositions and containing the endorsement of Richard T. Thompson, notary public Kings county, New York, endorsed "Filed May 25, 1917, P. T. Mitterling, Clerk District Court."

I will ask you whether or not you stamped and signed that filing mark.

A. I did.

74 Q. And did you open that jacket?

A. It don't show any marks on it that I did.

75 Q. Here it is (indicating).

A. Yes. I opened it.

76 Q. Now calling your attention to defendant's Exhibit "I," being depositions, were these depositions in that jacket?

A. Well, I didn't examine it, but I think they were.

77 Q. Were there any books in there?

A. There were not.

78 Q. Are there any books, record books, on file in this case in your office?

A. There are not.

79 Q. Have any been received by you in connection with these depositions, or otherwise?

114 A. There have not.

Witness excused.

Mr. Abbott: I object to the introduction of the books in evidence, Exhibits A, B, C, D, E, F, because they are not a part of these depositions and they have not been transmitted by the notary who took the depositions to this court, and, for the first time, they are now appearing in court.

Court: You may go ahead with your deposition. You was about to give us a computation. You may give that and we will see about the books later. The books are here, if we want them.

(Plaintiff excepts.)

Mr. Dysart: The real value of the books is to give them an opportunity to know what the computation means.

(Continuation of reading deposition of J. J. Cardoza.)

19 Q. Mr. Cardoza, how long have you been treasurer of the defendant?

A. About ten years.

20 Q. You may state whether or not the office of the defendant in Fremont, Nebraska, transmitted messages for the Government of the United States during the years 1914 and 1915 under and in accordance with the Post Road Act of July 24th, 1866, which Act, as has been testified, was duly accepted by the defendant.

A. It did.

21 Q. And the tolls collected by the defendant for those Government messages were fixed and determined by whom?

A. By the postmaster general of the United States.

22 Q. When the Government of the United States is mentioned, does it includes all the different departments of that Government?

5 A. Yes, sir.

23 Q. You may state when the defendant opened its office

in Fremont for the transaction of telegraph business.

A. In 1903.

24 Q. You may state whether the telegraph poles, wires and appliances of the defendant in Fremont are a part of the general telegraph system for the transmission of telegrams and cablegrams between the different states of the Union and foreign countries, as well as between the defendant's offices in various cities of the State of Nebraska.

A. They are.

25 Q. What telegraph service did the plaintiff, the City of Fremont, have prior to 1903, when your company extended its lines to that city and opened its office in that city for the transaction of telegraph business.

A. Prior to 1903, the Western Union Telegraph Company had a monopoly of the telegraph business at Fremont.

26 Q. How many telegraph offices does the defendant have in the State of Nebraska, or, rather, how many did it have on Jan'y 1st, 1914, January 1, 1915, and January 1, 1916?

A. It had 19 on January 1, 1914; the same number on January 1, 1915, and 18 on January 1, 1916.

27 Q. How many telegraph offices did the Western Union have in that state during those years?

A. 632.

28 Q. Does the defendant company pay any license fee or occupation fee to the State of Nebraska.

A. It does.

Mr. Abbott: That is objected to as incompetent, irrelevant, immaterial, no sufficient foundation laid.

Objection overruled. Plaintiff excepts.

116 29 Q. Can you produce the receipts of the state authorities showing the payment of such license fee for the years 1914 and 1915.

Plaintiff makes same objection, overruled, exception.

A. I can. I have them here with me.

Mr. Cook: I offer in evidence three so-called permits from the State of Nebraska to the defendant; one dated June 18, 1913, showing the payment of $20.00 occupation fee for the year ending June 30, 1914; the other, dated June 10, 1914, showing the payment of $25.00 occupation fee for the year ending June 30, 1915; and the third, dated June 14, 1915, $25.00 occupation fee for the year ending June 30, 1916, marked defendant's Exhibits 3, 4 and 5.

Mr. Abbott: We object and except to the introduction of these exhibits as incompetent, immaterial and irrelevant, no sufficient foundation laid therefor.

Objection overruled. Plaintiff excepts.

The same being admitted are hereto attached as follows:

17 30 Q. Mr. Cardona, you may state whether the defendant company pays regular ad valorem taxes on its property n Fremont to the State of Nebraska and the county of Dodge and ne City of Fremont.

Mr. Abbott: Plaintiff objects and excepts to Int. 30 as incompetent, nmaterial and irrelevant, no sufficient foundation laid.
Objection overruled. Plaintiff excepts.

A. It does.

31 Q. Have you the tax receipts showing such payments for the ears 1914 and 1915?
A. I have.

Same objection, ruling and exception.

32 Q. Can you produce them?

Same objection, ruling and exception.

A. I have them here.

Mr. Cook: I offer these two tax receipts in evidence marked exbits 6 and 7.

Mr. Abbott: Plaintiff objects to exhibits 6 and 7 as incompetent, elevant, immaterial, no sufficient foundation laid.

Objection overruled. Plaintiff excepts. Exhibits 6 and 7 being nitted in evidence are here set out as follows:

33 Q. These tax receipts, of course, speak for themselves; but I wish, Mr. Cardona, you would read into the record the ures from these two tax receipts, showing the taxes paid for those years.

Mr. Abbott: Plaintiff objects and excepts to the interrogatory 33 as naterial, irrelevant, incompetent, not the best evidence, and the ipts themselves being the best evidence of what they contain.
ourt: The receipts being here, it saves time. Go ahead.

laintiff excepts.

. For the year 1914, the assessment was $1470.00, and the unt of tax paid was $64.88. For the year 1915, the assessment the same, and the amount of tax paid was $62.99. These taxes actually paid and these receipts are signed by the county treas-

Q. You may state whether or not those taxes included the county and also the City of Fremont tax.
They did.

Q. Do you know what the amount was of the taxable value of ne physical property of the Postal Telegraph-Cable Company of aska located in the State of Nebraska as fixed by the authorities at state for the years 1914 and 1915? If so, state said amounts ach year, respectively.

Same objection as last above, same ruling and exception, also no sufficient foundation laid.

A. $26,865.00 was the assessment in 1914, and $25,248.00 in 1915.

36 Q. State what sum the Postal Telegraph-Cable Company of Nebraska paid to the various counties and cities of the State of Nebraska for the year 1914 as an ad valorem tax upon its physical property upon the assesseed valuation as fixed by the State authorities for that year. State also the same for the year 1915.

119

Mr. Abbott: That is objected to as incompetent, immaterial, irrelevant, not the best evidence, no sufficient foundation laid.

Objection overruled. Plaintiff excepts.

A. $1,190.72 in 1914, and $1,107.65 in 1915.

37 Q. State whether or not the Postal Telegraph-Cable Company of Nebraska has paid all taxes, both to the state and to the various counties and cities, as an ad valorem tax, levied by the various authorities for the year 1914 and for the year 1915.

Same objection, ruling and exception.

A. It has.

38 Q. Mr. Cardona, turning again to the treasurer's books and accounts. Can you tell me what the intrastate receipts of your Fremont office were for the year 1914.

Mr. Abbott: Objected to as incompetent, immaterial and irrelevant, not the best evidence, no sufficient foundation laid.

Objection overruled. Plaintiff excepts.

A. $108.28.

39 Q And what were the interstate receipts for that same year, 1914, at Fremont.

Same objection, ruling and exception.

A. $732.06.

40 Q. What were the intrastate receipts in 1915?

Same objection, ruling and exception.

A. $83.96.

41 Q. And what were the interstate receipts during 1915?

Same objection, ruling and exception.

120

A. $733.70.

42 Q. Adding the intrastate receipts to the interstate receipts, what were they in 1914?

Same objection, ruling and exception.

A. $840.34.

43 Q. And in 1915?

Same objection, ruling and exception.

A. $817.66.

44 Q. What were the total expenses of your Fremont office in 1914, not including any part of overhead expenses.

Same objection, ruling and exception.

A. $1,287.39.

45 Q. And what were they in 1915?

Same objection, ruling and exception.

A. $1,302.19.

46 Q. This, of course, does not include anything for depreciation, or interest or dividends or income on the capital invested.

Same objection, also suggestive, ruling and exception.

A. No sir, it does not.

47 Q. Does it include anything for superintendence, general management, or legal expenses, or general corporate expenses, or state or federal taxes, or anything that would come under the head of "overhead expense".

A. It does not.

48 Q. You are aware, Mr. Cardona, that the city of Fremont is trying to collect a license fee of $60.00 a year, are you not?

Mr. Abbott: Plaintiff objects as incompetent, immaterial and irrelevant.

(Overruled—plaintiff excepts.)

A. I am.

49 Q. Kindly state on the record what percentage of your
121 intrastate receipts at Fremont for 1914 this $60 would be.

Same objection, ruling and exception.

A. Over 55%.

50 Q. And what percentage for 1915?

Same objection, ruling and exception.

A. Over 71 per cent.

51 Q. Mr. Cardona, what proportion of the aggregate business of Fremont in 1914 was for intrastate receipts.

Same objection, ruling and exception.

A. 12.88 percent of the total.

52 Q. And what proportion in 1915.

Same objection, ruling and exception.

A. 10.26.

53 Q. Taking up now the local expenses of the Fremont office in 1914; What portion of them are properly apportionable to the intrastate business based on the preceding percentage.

Mr. Abbott: Plaintiff objects as incompetent, immaterial, irrelevant, no sufficient foundation laid and calling for the conclusion of the witness.

Objection overruled. Plaintiff excepts.

A. $165.81 for 1914.
Q. And how much for 1915.

Same objection, ruling and exception.

A. $133.60
55 Q. This would leave how much of those local expenses at Fremont as properly apportionable to the interstate business.

Same objection, ruling and exception.

A. $1,121.58 for 1914, and $1,168.59 for 1915.
56 Q. Will you again explain clearly just how you arrived at these proportions.

122 Same objection, ruling and exception.

A. I first obtained the proportion which intrastate receipts at Fremont bear to the combined interstate and intrastate receipts at Fremont, and then applied that proportion to the total local expense at Fremont. This gives me the amount of expense at Fremont properly apportionable to the intrastate business at Fremont.
57 Q. You may state whether in this mode of figuring you included the $60.00 license fee involved in this suit, the same as though it had been paid.

Plaintiff objects as incompetent, immaterial and irrelevant. Overruled, plaintiff excepts.

A. No, I did not include it.
58 Q. Based on these figures, if the company is compelled to pay this license fee of $60.00 for 1914, and the same amount for 1915, what loss would it sustain at Fremont on its intrastate business during those two years.

Same objection, ruling and exception.

A. In 1914, the loss would have been $134.73, and in 1915 $128.45.
59 Q. Mr. Cardona, turning now to the question of overhead expense. What does that include.
A. It includes superintendence, general management, legal expenses and maintenance of lines.
60 Q. What did these amount to for the year 1914.
A. The entire overhead expense of the defendant, being for the whole state of Nebraska. In 1914, was $12,587.87. The total ex-

penses of the defendant in 1914 were $73,060.77, including this overhead expense of $12,587.87.

61 Q. What were the entire receipts of the defendant company in Nebraska in 1914.

123 A. $79,209.98. I would add that the defendant company owns no property and does no business, and has no receipts outside of the State of Nebraska. These entire receipts $79,209.98 are the aggregate of the receipts of the defendant's different offices in the State of Nebraska.

62 Q. From these figures, what percentage does the overhead expense bear toward the expense?

Plaintiff objects as incompetent, immaterial and irrelevant. Overruled. Plaintiff excepts.

A. 15.89 per cent.

63 Q. I wish you would apply this to the intrastate receipts at Fremont for 1914, which were $108.28.

Same objection, ruling and exception.

A. This figures that $17.20 of the overhead expense should be attributed to the intrastate receipts at Fremont in 1914.

64 Q. Apply the same method to 1915.

Same objection, same ruling and exception.

A. The overhead expense in 1915 was $16,820.36. The total expenses of the defendant in 1915 were $85,425.65, including this overhead expense of $16,820.36. The entire receipts in the state were $75,028.04. This means that $18.21 of the overhead expense should be attributed to the intrastate receipts.

65 Q. Mr. Cardona, can you now summarize the above figures for 1914 and 1915.

Same objection, ruling and exception.

A. For 1914, the summary would be as follows:

Intrastate receipts		$108.28
Intrastate expenses	$168.81	
Intrastate overhead expenses	17.20	
Total		183.01

Those figures do not include the license fee involved in this case, nor depreciation; because I do not know what the latter is, nor any return on the investment. As to 1915, the summary would

124 be as follows:

Intrastate receipts		$83.96
Intrastate expenses	133.60	
Intrastate overhead expenses	18.81	
Total		152.41

Those figures do not include the amount of the license fee involved in this case, nor depreciation, because I do not know what the latter is, nor any return on the investment.

66 Q. Is the above mode of figuring the same as was approved by the Supreme Court of Georgia in the Cordele vase?

Plaintiff objects as incompetent, irrelevant and immaterial. Objection sustained. Defendant excepts.

Mr. Dysart: The defendant offers the answer just excluded to question 66:—"IT is"

Same objection, same ruling and exception.

Signed) JOSEPH J. CARDONA.

67 Q. Mr. Cardona, the figures which you gave yesterday as to the intrastate expenses of your office in the City of Fremont show that the expenses were considerably more than the receipts even if this license fee of $60 a year had not been imposed. How is this loss made up?

Mr. Abbott: Plaintiff objects as incompetent, immaterial, irrelevant, calling for the conclusion of the witness.

Objection sustained. Defendant excepts.

Mr. Dysart: Defendant offcers the answer excluded, as follows: It is made up by the interstate receipts.

Same objection, ruling and exception.

68 Q. That loss being increased by $60.00 a year, would or would not that additional loss of $60,00 be paid out of the interstate receipts.

Plaintiff objects as incompetent, immaterial, irrelevant,
125 calling for the conclusion of the witness.

Objection sustained. Plaintiff excepts.

Mr. Dysart: Defendant offers the answer to int 67, as follows: "it would."

Same objection, same ruling and exception.

69 Q. What do you mean by your interstate receipts.

Plaintiff objects as incompetent, immaterial and irrelevant. Overruled. Plaintiff excepts.

A. I mean the transmission and delivery of interstate and international telegrams and cablegrams; in other words, telegrams and cablegrams between Fremont and points in other states and foreign countries.

J. J. CARDONA.

Sworn to and certificate attached to deposition. [SEAL.]

Mr. Dysart: In connection with this deposition the defendant, at the close of the reading of the deposition, states that the exhibits referred to in the deposition are present in the courtroom for inspection.

126 J. G. WOLF, being called on part of defendant, sworn and examined, testified as follows:—

Examined by Mr. Dysart:

80 Q. State your name, residence and occupation.
A. J. G. Wolf; Omaha, Nebraska; manager at Omaha and supervisor of state offices.
81 Q. What offices?
A. Offices of the Postal-Telegraph-Cable Company of Nebraska.
82 Q. As supervisor of the various offices of the Postal Telegraph Cable Company of Nebraska, what are your duties with reference to the Postal office at Fremont.
A. Looking after the conduct of the office and auditing the accounts.
83 Q. Are you familiar with the method of bookkeeping of that office.
A. I am.
84 Q. And do you check up the books from time to time and know they are correct?
A. I do.
85 Q. State what books or papers are present in the office of Fremont showing receipts and expenses of the Fremont office.
A. Book of Disbursements and Receipts. It is a daily journal.
86 Q. Do you have also temporary daily slips that are made of the business and the receipts and disbursements of that office.
A. Yes.
87 Q. How many of those would there be on each day, approximately?
A. Approximately 150.
88 Q. And, in order to arrive at the receipts and expenditures of the office at Fremont, from these papers and documents, you would have to examine all these different documents and make a computation.
127 A. Not necessarily. A computation could be made from the summary which is made at the close of each month.
89 Q. And that summary you then verify with the monthly statements, from month to month, as they are made.
A. And with the daily statements.
90 Q. And you know those statements to be correct.
A. Yes, sir.
91 Q. Can you from that data make a computation showing what the receipts and disbursements, both interstate and intrastate, at Fremont, are for a given period?
A. Yes, sir.
92 Q. Have you made a computation of what the intrastate receipts would be for the year beginning with the 25th day of April,

1914—Well, from the last Tuesday in April, 1915, to the last Tuesday in April, 1916?

A. I have made those computations.

93 Q. What were the intrastate receipts for that period.

Mr. Abbott: Plaintiff objects because no proper foundation has been laid.

94 Q. Are the books present in the courtroom from which this computation was made?

Same objection, overruled, plaintiff excepts.

A. Yes, sir. The intrastate receipts from April 27, 1915, to April 24, inclusive, 1916, amounted to $71.89.

95 Q. Have you made a computation of what the interstate receipts were for the same period?

A. I have.

96 Q. What does that amount to?

A. The interstate receipts were $884.24.

97 Q. Have you made a computation as to what the total

128 expenses of the Fremont office were during that period?

A. The office expenses for that period amounted to $1,266.04.

98 Q. Does that include the county tax of Dodge county?

A. No, sir.

99 Q. What does that amount to for that year.

A. $62.99.

100 Q. And the total including that tax would be what?

A. $1,329.03.

101 Q. Does that computation include the $60.00 occupation tax sued for in this case.

A. It does not.

102 Q. Does it include the general overhead expenses of the state?

A. No, sir, it does not.

103 Q. Or anything for interest on the investment, or dividends, returns?

A. No, sir, it does not.

104 Q. Have you made a computation of the intrastate receipts from the last Tuesday in April, 1916, to the date this suit was begun?

A. I have.

105 Q. What were the intrastate receipts.

A. Intrastate, from April 25, 1916, to August 26, 1916, inclusive $21.38.

106 Q. Have you made a computation of the interstate receipts for the same period?

A. I have.

107 Q. What were they?

A. $279.75.

108 Q. Have you made a computation of what the expenses of this office were for that period?

129 A. I have.

109 Q. What was that expense?

A. $404.93.

110 Q. Does that include county taxes of every kind for the year 1916?

A. It does not.

111 Q. What is that tax for 1916?

A. $68.78.

112 Q. If that were added to the other expenses how much would it be?

A. $473.71.

113 Q. Does that include the occupation tax sued for in this action, for 1916?

A. It does not.

114 Q. Does it include anything for overhead expenses?

A. No, sir.

115 Q. Does it include interest on the investment?

A. No, sir.

116 Q. Does it include dividends?

A. No, sir.

117 Q. Or income?

A. No sir.

118 Q. Are the books and papers from which you made your computation here in the courtroom?

A. Yes, sir.

119 Q. You know this computation to be correct?

A. Yes, sir.

120 Q. How long have you been manager of the Postal Telegraph-Cable Company of Nebraska?

A. About eight years.

121 Q. Where has the office in Fremont been located during that time? At the present location?

130 A. Yes, sir, at the present location.

122 Q. Have the wires and poles been located at the same location all the time during this period?

A. As far as I know.

Cross-examination waived. Witness excused.

BERNARD A. WOLSAGER, being called on the part of the defendant, sworn and examined, testified as follows:

Examined by Mr. Dysart:

123 Q. What is your name?

A. Bernard A. Wo*l*ager.

124 Q. What is your business?

A. Manager Postal Telegraph-Cable Company, Fremont office.

125 Q. How long have you been with the Postal?

A. One year and five days.

126 Q. How long have you lived in Fremont?

A. About five years.

127 Q. Does the Postal Telegraph-Cable Company handle both interstate and intrastate messages at this point?

A. Yes, sir.

128 Q. Are you familiar with the streets and alleys in the city of Fremont?

A. Yes, sir.

129 Q. Where is the office of the Postal Telegraph-Cable Company located in Fremont at this time?

A. It is between Main and Park.

130 Q. Where is it with reference to the alley running north and south between Main and Park?

A. It is right at the alley.

131 Q. On which side of the alley?

A. On the East side.

131 132 Q. Where are the poles of the Postal Telegraph-Cable Company located in Fremont?

A. The first pole is located north of the alley, on the west side of the alley. The second——

133 Q. Between what streets?

A. Between Park and Main.

134 Q. Where is the 2nd pole?

A. The 2nd pole is located south of the rear alley.

135 Q. South of the east and west alley you mean?

A. South of the east and west alley, yes, and between 4th and 3rd—three poles. The first pole is located north of the alley, west side of the alley; the 2nd, south of the rear alley, on the west side of the alley.

136 Q. Where is the 3rd pole located?

A. It is south of the first pole south.

137 Q. Now with reference to the east and west street.

A. Well, north of 3rd, on the west side of the alley.

138 Q. The first two poles you describe are in the alley between 5th and 4th street, are they not?

A. Yes, sir.

139 Q. And where is the next pole with reference to 4th street; north or south of 4th street?

A. South.

140 Q. Is that also in the alley?

A. Yes.

141 Q. Which side of the alley?

A. West side.

142 Q. North or south of the cross alley, east and west alley?

A. South.

143 Q. How many poles are there between 4th and 3rd streets?

A. Three.

144 Q. Where are those?

A. The first pole is located north of the rear alley, on the 132 west side. 2and pole, south of the rear alley, on the west side of the alley; and the pole south of that is located right west of the alley.

145 Q. Where is it with reference to 3rd street?

A. It is right north of 3rd from the alley.

146 Q. How many poles are there between 3rd and 2nd street?

A. Two poles. The first pole is located north of the rear alley on the west side of the alley; the 2nd pole is located south of the rear alley, on the west side of the alley.

147 Q. By the "rear alley" you mean the east and west alley?
A. Yes.
148 Q. Where is this alley located you have been testifying to as the north and south alley; between what streets?
A. Between 5th and——
149 Q. I mean between which north and south streets. What is the street east of this alley you refer to?
A. (No answer.)
150 Q. This alley you refer to is the alley extending north and south between Main and Park streets.
A. Yes, sir.
151 Q. Where is Broad Street with reference to Park Street?
A. The first street west of Park.
152 Q. Where is South street with reference to 1st street? Is South street a street down among the railroad tracks?
A. Yes, sir.
153 Q. Now is the Postal Telegraph-Cable Co.'s wire strung on these poles you have described?
A. Yes.
154 Q. After it reaches 2nd street, then where does it pass to?
A. It runs west to Park and south to about one hundred feet.
133 155 Q. Is it strung on poles other than the Postal Telegraph-Cable Company poles, part of the way.
A. Yes.
156 Q. These poles you describe are all the poles the Postal has outside of the right of way of the Railroad, are they?
A. Yes, sir.
157 Q. How much space do these poles occupy; how much space of ground.
A. About a foot square.

Cross-examination.

By Mr. Abbott:

158 Q. In this north and south alley which you refer to, situated between Park and Main, how many different lines of wire are there strung through that alley north and south; that is, how many companies occupy the alley.
A. I think about two.
159 Q. One of the telephone company's main leads is through the alley, isn't it?
A. Yes.
160 Q. Are there any electric company's wire through there.
A. Yes.
161 Q. How many?
A. One.
162 Q. City or private?
A. I don't know.
163 Q. How wide an alley is this?
A. About ten feet.

164 Q. About ten feet wide. There are about seventy lines of wires through that alley, are there not, including your own.
A. I don't know.

165 Q. Well, I direct your attention to the rear window of the court-room. Do you see that line of poles running through that alley? (witness steps to the window)
A. Yes, sir.

166 Q. Tell me how many lines of wires there are going north and south through that alley, and how many cross-arms?
A. Four cross arms.

167 Q. Four cross? 5 cross-arms there are on the east and 4 on the west, are there not?
A. Five on the west, and four on the east.

168 Q. Nine cross-arms, are there?
A. Yes, sir.

169 Q. How many wires to an arm.
A. One.

170 Q. Sir? How many different wires to each cross-arm? How many glass knobs and wires are there on each cross arm? Six or seven?
A. About seven.

171 Q. Then there are about sixty wires north and south in the open through this alley?
A. Yes.

172 Q. And the wires of the Postal Telegraph Company are on the poles of the telegraph company and on the poles of the Electric Light Company, and they are all in there together? Is that correct.
A. No, sir.

173 Q. They all run north and south through this alley together?
A. Yes.

174 Q. For about four blocks of the business portion of this city.
A. Yes, sir.

Redirect examination.

135 175 Q. These poles and cross-arms are not the property of the Postal Telegraph Company?
A. No sir.

176 Q. Are they on the same side of the street as the Postal poles?
A. Yes, sir.

177 Q. And extend as far out in the alley as the Postal poles do?
A. Yes, sir.

Recross-examination:

178 Q. I understand your wires are part of the way on the Electric light and Telephone poles, and part of the way on your own poles? Is that correct.
A. Yes, sir.

179 Q. Have you had any trouble with these wires through that alley since you have been manager?
A. No sir.

180 Q. Who looks after the line north and south through the alley, the line of your company?
A. The lineman.
181 Q. Do you have a lineman located here?
A. No, sir.
182 Q. Who attends to conflicts between your wires and the other wires? Who calls your attention to that?
A. The supervisor.
183 Q. The street commissioner of the city?
A. Yes, sir.
184 Q. He calls your attention from time to time that matters need attention in the alley, does he.
A. No, sir.
185 Q. Since you have been here?
A. No.
136 186 Q. Do you know the street commissioner?
A. No, sir.

Redirect examination:

187 Q. Who did you mean when you said "supervisor."
A. Mr. Wolf.
188 Q. It is the company's own men——
A. Yes, sir.
189 Q. Who call your attention to anything wrong with the wires?
A. Yes, sir.

Witness excused.

D. J. SPRINGER, being called on the part of the defendant, sworn and examined, testified as follows:

Examined by Mr. Dysart:

190 Q. What is your business?
A. Real estate loan and insurance business.
191 Q. How long have you been in the real estate business.
A. Since 1889.
192 Q. Here in Fremont?
A. Yes.
193 Q. Are you familiar with the values of real estate.
A. Reasonably so, yes sir.
194 Q. What is the value of a lot on the west side of the alley on the south side of 5th street, between Park and Main, without buildings on it.
A. $4750.00.
195 Q. How large a lot do you refer to there.
A. 22 feet.
196 Q. By how deep?
A. 140, if there is no alley behind there. I am not so sure whether there is an open alley running through there or not;
137 possibly there is not. I am not positive whether there is an alley behind here or not, a laid out alley.

197 Q. If there is an alley, how large would the alley be?

A. Half of it would be eight feet wide, north and south.

198 Q. What is the value of a lot on the west side of the alley north of 4th street, between Park and Main.

A. $3500.00.

199 Q. What size is that lot you refer to.

A. The same.

200 Q. What is the value of a lot on the south side of 4th street on the west side of the alley between Park and Main streets.

A. Possibly a little less, not much; maybe $3250.00.

201 Q. What is the value of a lot on the north side of 3rd street on the west side of the alley between Park and Main streets.

A. $2250.00.

202 Q. For a lot what size?

A. Same size.

203 Q. What is the value of a lot on the south side of 3rd street on the west side of the alley between Main and Park streets.

A. Possibly a little less; in the neighborhood of $2000.00.

204 Q. What would be the size of that lot?

A. Same.

205 Q. What is the value of a lot on the north side of 2nd street on the west side of the alley between Park and Main?

A. If it were possible to get the railroad extended it might be worth about the same, or possibly a little more, from $2000.00 to $2250.00.

206 Q. What would it be worth as it stands now.

A. About the same as on the north.

207 Q. What would that be?

A. $2000.00.

138 208 Q. For what size of lot?

A. The same size.

209 Q. This is the reasonable market value of the various lots?

A. I would so consider it, yes, sir.

210 Q. Could you give the rental value of a vacant lot as it stands there of these various pieces of property?

A. I don't know of any lots of that kind that have been rented. They usually rent them on an interest basis of 6 or 7 per cent. according to the agreement or contract. You get him just for the vacant lot and then have it appraised at certain intervals. I don't know of any rented of that kind now.

Cross-examination.

By Mr. Abbott:

211 Q. Mr. Springer, there are only one or two such lots in all of the area you have testified about? Isn't that correct.

A. Vacant, you mean?

212 Q. Yes.

A. Yes, just the two; one down——

213 Q. As a matter of fact, these blocks you testify with reference to have the most of their buildings facing east and west away from this alley you have spoken of.

A. No; they face north and south.

214 Q. The block along Main street, as you see the buildings.

A. The buildings on those properties face north or south.

215 Q. Yes, where there are buildings. But the east half of these blocks is covered principally with buildings facing the other street.

A. Yes. When you get east of the alley they face the other
139 way; but on the properties he asked about the buildings face north or south.

216 Q. That is, in these three or four blocks, in two or three locations.

A. Yes, sir.

Witness excused.

Defendant rests.

Mr. Abbott: I want the record to show an offer of the various exhibits that I offered, and, especially the ones that Mr. Wolz and Mr. De La Matyr both identified. I made the offer and called Mr. Wolz to identify it. And I want to reoffer those, being the council minutes in 1903.

Mr. Dysart: Excepted to for the same reasons given at the time they were originally offered.

Court: The same ruling (Exception).

Exhibits received and read in evidence.

Plaintiff rests.

Mr. Abbott: This case being on trial and both parties having introduced their evidence and rested, plaintiff: First, moves the court to withdraw this case from the jury, for the reason that on the pleadings and the evidence there is no question for submission to the jury.

2. Plaintiff moves the court to enter judgment in favor of plaintiff and against the defendant as prayed for in plaintiff's petition, for the reason that on the pleadings and the evidence plaintiff is entitled to judgment; and I would like to be briefly heard on that motion.

(The court here excused the jury during argument.)

Court: I will say that the court will treat this as a motion to direct a verdict instead of a motion to withdraw the case from the jury.

(After argument to the court, the jury were recalled.)

140 and the court addressed them as follows:

Court: Gentlemen of the jury, the court believes that there is no question of fact involved in this case, only a question of law; and, therefore, the court takes the responsibility. There is no question of fact involved because:

First. The unreasonableness of this ordinance, as to whether it is confiscatory or not, is a question of law for the court.

Second. If it is confiscatory as to a class doing business under this ordinance, there is no proof of any other member of the class except this one company, and that would be insufficient to warrant the court in submitting it to the jury.

You are, therefore directed to return a verdict for the plaintiff for the whole amount sued for.

Defendant excepts.

The foreman of the jury signed a verdict in accordance with the above direction, and then the jury were discharged from the case.

141 I, Wm. E. Butler, acting reporter of the 6th judicial district of Nebraska, hereby certify that as such reporter I made a full, true and correct shorthand report of all evidence, both oral and documentary, offered, admitted, introduced, heard, read, and received, on the trial of the above entitled case, as well as a full, true and correct report of all objections of counsel, all rulings of the court thereon, all exceptions of counsel thereto, all motions, agreements and stipulations, made and entered into by respective counsel during the trial of said case.

And I further certify that the above and foregoing typewritten pages contain a full, true and correct transcript of my report so made as aforesaid.

Dated at Fremont, this 15th day of October, 1917.

WM. E. BUTLER,
Reporter, Room 318 1st Nat'l Bank Bldg.

STATE OF NEBRASKA,
Dodge County, ss:

I, P. T. Mitterling, Clerk of the District Court in and for Dodge County, Nebraska, do hereby certify that the foregoing "Bill of Exceptions" is the original Bill of Exceptions allowed by the Court and filed in my office in this case.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of said District Court this 22nd day of November, A. D. 1917.

[SEAL.]

P. T. MITTERLING,
Clerk,
By J. EMMA ROBINSON,
Deputy.

Endorsed: Filed Nov. 17, 1917. P. T. Mitterling, Clerk of Dist. Court.

(Endorsed:) City of Fremont v. Postal Telegraph Cable Co. Bill of Exceptions. Supreme Court of Nebraska. Filed Nov. 27, 1917. H. C. Lindsay, Clerk.

142 And afterwards, to wit, on August 1, 1918, there was filed in the office of the Clerk of said Supreme Court, a certain stipulation, in words and figures following, to wit:

In the Supreme Court of Nebraska.

(General No. 20419.)

CITY OF FREMONT, Plaintiff and Appellee,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, Defendant and Appellant.

Stipulations.

It is stipulated between the Appellant and Appellee in the above entitled cause that time for filing appellee's brief in the Supreme Court may be extended to October 1, 1918.

DYSART & DYSART,
Attorneys for Appellant.

J. F. ROHN AND
C. E. ABBOTT,
Attorneys for Appellee.

(Endorsed:) 20419. City of Fremont v. Postal Telegraph-Cable Co. Stipulation. Supreme Court of Nebraska. Filed Aug. 1, 1918. H. C. Lindsay, Clerk.

143 And afterwards, to wit, on the 6th day of August, 1918, there was entered of record in the Journal of said Supreme Court, a certain order, which said order is in words and figures following, to wit:

Supreme Court of Nebraska, January Term, A. D. 1918.

Aug. 6.

No. 20419.

CITY OF FREMONT, NEBRASKA, Appellee,

vs.

POSTAL TELEGRAPH-CABLE CO., a Corporation, Appellant.

Appeal from the District Court of Dodge County.

This cause coming on to be heard upon stipulation of parties for an extension of time within which appellee may serve answer briefs, was submitted to the court; upon due consideration whereof, it is by the court ordered that said stipulation be, and same hereby is, allowed and appellee given until October 1, 1918, to serve answer briefs herein.

A. M. MORRISSEY,
Chief Justice.

144 And afterwards, to wit, on the 26th day of October, 1918, there was filed in the office of the Clerk of said Supreme Court, a certain stipulation, in words and figures following, to wit:

In the Supreme Court of Nebraska.

General No. 20419.

CITY OF FREMONT, NEBRASKA, Plaintiff & Appellee,

vs.

POSTAL TELEGRAPH-CABLE COMPANY, a Corporation, Defendant & Appellant.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled action that the time for filing Answer Brief by Plaintiff and Appellee is hereby extended to December 1st, 1918.

Dated this 30th day of September, 1918.

CITY OF FREMONT, NEBRASKA,
Plaintiff and Appellee,
By J. F. ROHN AND
C. E. ABBOTT,
Its Attorneys.
POSTAL TELEGRAPH CABLE COMPANY,
a CORPORATION,
Defendant and Appellant,
By DYSART & DYSART,
Its Attorneys.

(Endorsed:) 20419. City of Fremont v. Postal Telegraph-Cable Co. Stipulation in re briefs. Supreme Court of Nebraska. Filed Oct. 26, 1918. H. C. Lindsay, Clerk.

145 And on the same date, there was entered of record in the Journal of said Supreme Court, a certain order, which order is in words and figures following, to wit:

Supreme Court of Nebraska, September Term, A. D. 1918.

Oct. 26.

No. 20419.

CITY OF FREMONT, Appellee,

v.

POSTAL TELEGRAPH-CABLE CO., Appellant.

Appeal from the District Court of Dodge County.

This cause coming on to be heard upon stipulation of parties for an extension of time within which appellee may serve briefs herein,

was submitted to the court; upon due consideration whereof, it is by the court ordered that said stipulation be, and the same hereby is, allowed and appellee given until December 1, 1918, to serve briefs.

A. M. MORRISSEY,
Chief Justice.

146 And afterwards, to wit, on the 6th day of March, 1919, there was entered of record on the Journal of said Supreme Court, a certain order, which is in words and figures following, to wit:

Supreme Court of Nebraska, January Term, A. D. 1919.

March 6.

"The following cases were argued by counsel and submitted to the court:

* * * * * * *

No. 20419.

CITY OF FREMONT

v.

POSTAL TELEGRAPH-CABLE CO.

Appeal from Dodge County.

* * * * * * *

A. M. MORRISSEY,
Chief Justice.

147 And afterwards, to wit, on May 3, 1919, there was entered of record on the Journal of said Court, a certain judgment, in words and figures following, to wit:

Supreme Court of Nebraska, January Term, A. D. 1919.

May 3.

No. 20419.

CITY OF FREMONT, Appellee,

v.

POSTAL TELEGRAPH-CABLE CO., Appellant.

Appeal from the District Court of Dodge County.

This cause coming on to be heard upon appeal from the district court of Dodge county, was argued by counsel and submitted to the court; upon the due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said

district court. It is, therefore, ordered, and adjudged that said judgment of the district court be, and same hereby is, affirmed at the costs of appellant, taxed at $; for all of which execution is hereby awarded, and that a mandate issue accordingly.

A. M. MORRISSEY,
Chief Justice.

148 And on the same date, to wit, on May 3, 1918, there was filed in the office of the Clerk of said Court, a certain opinion, upon which the foregoing judgment was entered, and the following is a copy of such opinion:

149 No. 20419.

CITY OF FREMONT

v.

POSTAL TELEGRAPH-CABLE CO.

Opinion.

Filed May 3, 1919.

1. Where a proper basis for classification exists, a tax imposed upon all persons or companies engaged in a certain occupation does not deny the equal protection of the law guaranteed by the fourteenth amendment.

2. The reasonableness of a tax does not depend upon whether or not a hardship may be worked in an isolated case but upon the general operation of the tax in the class to which it applies.

3. In imposing an occupation tax for revenue purposes upon a telegraph company doing an intrastate business a city is not limited to the mere rental value of the city's property occupied by defendant's poles and wires and the expenses arising from their supervision, but the extent of the tax is a matter for the judgment and discretion of the municipal government, subject only to the restriction that it must not be prohibitory.

4. Mere proof of loss in operation for a period of two years by an individual telegraph company without showing what the volume of business available in the municipality is, or what portion thereof is done by such company, or what facilities it has for handling the business offered, is insufficient to show that an annual occupation tax of $60 imposed for revenue purposes on the privilege of doing an intrastate business in a city of over 8,000 inhabitants is unreasonable.

150 5. In imposing an occupation tax for revenue purposes a municipality acts as the agent of the state and where such tax is imposed on a telegraph company doing both an intrastate and an interstate business any deficit arising from the payment of a tax on

the privilege of doing an intrastate business within the municipality becomes a charge on the revenue such company obtains from its intrastate business as a whole and the tax does not become a burden upon the company's interstate business merely because the amount imposed by the municipality is greater than the company's net receipts in that municipality for intrastate business.

6. The tax imposed held not to be a charge on interstate commerce.

MORRISSEY, *C. J.*:

In 1903 the Postal Telegraph-Cable Company applied for a franchise in the city of Fremont and was granted the right to carry on a telegraph business therein for a period of twenty-five years. At that time the city had an ordinance, which is still in force, imposing an occupation tax of $60 a year on the business of transmitting and receiving intrastate telegraph messages. The telegraph company paid this tax, without protest, up to 1910 when it refused to make further payments. It did, however, through an alleged mistake on the part of one of its departments, make payment of the tax for the year 1914. The city now sues to collect the tax for the years 1915 and 1916. The court directed a verdict for plaintiff and the telegraph company appeals.

The right of a municipality of the class to which plaintiff belongs to impose an occupation tax of this character, if it be reasonable, has already been determined by this court. Western Union Telegraph Co. v. City of Fremont, 39 Neb. 692; Western Union Telegraph Co. v. City of Fremont, 43 Neb. 499. And where a proper basis for classification exists, such a tax, if made applicable to *to* all
151 persons or companies in the occupation taxed, as in the present instance, does not deny the equal protection of the law guaranteed by the fourteenth amendment. 6 R. C. L. 375, sec. 370.

On behalf of defendant it is argued that this tax is unreasonable; that the intrastate message receipts of defendant's Fremont office, after payment of other expenses, are insufficient to pay the tax; that a part of such tax must be paid from the proceeds of interstate messages; that such payment casts a burden upon interstate commerce and the tax is therefore violative of the federal constitution.

The proof in support of these allegations shows that during the years 1914 and 1915 defendant's Fremont office was operated at a loss and that a payment of the tax for these two years would occasion deficits on defendant's intrastate business at Fremont of $143.73 and $128.45, respectively. No figures are offered for any of the preceding years. But even if the evidence at hand is sufficient to warrant us in assuming antecedent and prospective losses in the operation of defendant's business at Fremont we do not regard this as a satisfactory test of the reasonableness or unreasonableness of the tax involved. Defendant's losses may be due to conditions for which it is itself responsible. The reasonableness of a tax does not depend upon whether or not a hardship may be worked in an isolated case but upon the general operation of the tax in the class

to which it applies. Ohio River & W. Ry. Co. v. Ditey, 203 Fed. 537. As said by Justice Lumpkin in Mayor & Aldermen of Savannah v. Cooper, 131 Ga. 670, 63 S. E. 138, 141, "A city tax on an occupation must be reasonable with reference to such vocation. This does not mean that it must be adjusted to the amount of business of each individual, or limited exclusively by the receipts of some particular individual, but, considering that business within the municipality as a whole, the tax must be reasonable and not arbitrarily discriminatory."

The tax in question is not a mere license or regulation measure but one designed for revenue purposes. The statute authorizing its imposition and the ordinance fixing its amount both clearly so designate it. The city is not limited to the mere rental value
152 of the public property occupied by defendant's poles and wires, and the expenses arising from their supervision, and hence defendant's evidence on these points can only be of incidental significance. The extent of the tax is a matter for the judgment and discretion of the municipal government, subject only to the restriction that it must not be prohibitory. 2 Cooley, Taxation (3rd ed.) 1139, 1140.

Is the tax in question, when considered as a revenue measure, so unreasonable in amount as to be prohibitory? Mere proof of loss in operation for a period of two years by an individual telegraph company without showing what the volume of business available in the municipality is, or what portion thereof is done by such company, or what facilities it has for handling the business offered, is insufficient to show that an annual occupation tax of $60, imposed for revenue purposes, on the privilege of doing an intrastate business in a city of over 8,000 inhabitants is unreasonable.

Defendant further contends that the tax is violative of the commerce clause of the federal constitution. The argument on this point may be summarized as follows: Section 7408, Rev. St. 1913, requires a telegraph company to transmit messages, on demand, between its several offices in Nebraska. The intrastate receipts at defendant's Fremont office are insufficient to pay this tax together with other expenses. A portion of the tax must therefore be paid from the receipts on interstate messages. Such payment casts a burden on interstate commerce and is violative of the federal constitution.

Defendant's proof shows that not only its intrastate, but also its interstate business at Fremont, was conducted at a loss during the years for which figures are given. Is this tax, then, a burden on interstate commerce? In imposing an occupation tax for revenue purposes a municipality acts as the agent of the state and where such tax is imposed on a telegraph company doing both an intrastate and an interstate business any deficit arising from the payment of a tax on the privilege of doing an intrastate business within the municipality becomes a charge on the revenue such company
153 obtains from its intrastate business as a whole and the tax does not become a burden upon the company's interstate business merely because the amount imposed by the municipality is greater than the company's net receipts in that municipality for

intrastate business. If this revenue is insufficient, section 7409, Rev. St., 1913, provides a remedy.

The judgment is affirmed.

Cornish and Sedgwick, JJ. not sitting.

154 And afterwards, to-wit, on the 3rd day of July, 1919, there was filed in the office of the Clerk of said Supreme Court, a certain Petition for a writ of error, which said original petition with the allowance thereof, endorsed thereon, is marked Exhibit "A." and attached hereto.

155 EXHIBIT A.

H. C. Lindsay.

To the Honorable Andrew M. Morrissey, Chief Justice of the Supreme Court of Nebraska:

And now comes Postal Telegraph-Cable Company, defendant, and represents that on the 3d day of May, 1919, a final judgment was duly entered by the Supreme Court of Nebraska affirming the judgment entered by the District Court of Dodge County, Nebraska, in an action at law wherein City of Fremont was plaintiff and Postal Telegraph-Cable Company was defendant, and awarding costs in favor of plaintiff.

That this is an action for the recovery of One Hundred and Twenty Dollars, the amount of license or occupation taxes assessed by the plaintiff against the defendant for doing a telegraph business in said City of Fremont for the year- 1915 and 1916 under an ordinance of the said city.

And your petitioner avers that in its said answer it expressly charged that the said ordinance was unconstitutional and deprived your petitioner of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and that said ordinance was unconstitutional and imposed a burden and regulated the interstate commerce of your petitioner in violation of Section Eight, Article One, of the Constitution of the United States.

And petitioner shows that the said judgment and decision sustained the validity of the said ordinance and held that the same was not repugnant to the Constitution of the United States, and such judgment and decision was and is repugnant to the Constitution and laws of the United States.

And your petitioner further avers that in the aforesaid judgment and proceedings certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignment of errors which is filed herewith.

156 Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this case to the Supreme Court of Nebraska for the correction of errors so complained of and that a transcript of record, proceedings, and

papers in this cause, duly authenticated by the clerk of the Supreme Court of Nebraska may be sent to the Supreme Court of the United States as provided by law.

Dated, at Omaha, the 3 day of July, 1919.

DYSART & DYSART,
Attorneys for Postal Telegraph-Cable Company,
Petitioner and Plaintiff in Error.

July 3, 1919.
Writ allowed.

A. M. MORRISSEY,
Chief Justice Supreme Court of Nebraska.

157 [Endorsed:] In the Supreme Court of the State of Nebraska. 20419. City of Fremont, Nebr., Plaintiff and Appellee, vs. Postal Telegraph-Cable Company, Defendant and Appellant. Supreme Court of Nebraska. Filed Jul- 3, 1919. H. C. Lindsay, Clerk. Petition in Error. J. T. Dysart, Att'y for Defendant.

158 And on the same date, July 3, 1919, there was filed in the office of the Clerk of said Supreme Court, a certain Assignment of Errors, said original Assignment of Errors, marked Exhibit "B" is attached hereto.

159

EXHIBIT B.

H. C. Lindsay.

In the Supreme Court of the United States.

POSTAL TELEGRAPH-CABLE COMPANY
v.
CITY OF FREMONT.

Error to Supreme Court of Nebraska.

Assignment of Errors.

And now comes Postal Telegraph-Cable Company, petitioner and plaintiff in error by Dysart and Dysart, its attorneys, and in connection with its petition for a writ of error shows that, in the record and proceedings and in the rendering of the judgment and decision of the Supreme Court of Nebraska in the above entitled cause, manifest error has intervened to the prejudice of this petitioner and plaintiff in error in this, to-wit:

First. The court erred in holding that the ordinance of the City of Fremont, involved in this action, was constitutional and did not violate Section Eight of Article One of the Constitution of the United States.

Second. The said court erred in holding that the said ordinance was constitutional and did not violate the Fourteenth Amendment

to the Constitution of the United States and did not deprive the plaintiff in error of its property without due process of law.

By reason whereof, this petitioner and plaintiff in error prays that the said judgment of the Supreme Court of Nebraska may be reversed, etc.

Dated, Omaha, the 3rd day of July, 1919.

DYSART & DYSART,
Attorneys for Postal Telegraph-Cable Company.

160 [Endorsed:] In the Supreme Court of the State of Nebraska. 20419. City of Fremont, Nebr., Plaintiff and Appellee, vs. Postal Telegraph-Cable Company, Defendant and Appellant. Supreme Court of Nebraska. Filed Jul. 3, 1919. H. C. Lindsay, Clerk. Assignment of Error. J. T. Dysart, Att'y for Defendant.

161 & 162 And on this same date, to-wit, July 3, 1919, there was filed and entered on the Journal of said Supreme Court, an Order, which said order is in words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1919, July 3.

No. 20419.

CITY OF FREMONT, Appellee,

v.

POSTAL TELEGRAPH-CABLE CO., Appellant.

Appeal from the District Court of Dodge County.

On reading of the petition of the Postal Telegraph-Cable Company for writ of error and assignment of errors, and upon due consideration of the record of said cause:

It is ordered that a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of the State of Nebraska as prayed for in said petition and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law, upon condition that the said petitioner and plaintiff in error, Postal Telegraph-Cable Company, give security in the sum of five hundred dollars, that the said plaintiff in error shall prosecute said writ of error to effect, and if said plaintiff in error fail to make his plea good, shall answer to the defendant in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiff in error now presenting a bond in the sum of five hundred dollars with American Surety Company as surety, it is ordered that the same be and hereby is duly approved.

A. M. MORRISSEY,
Chief Justice.

163 And on this same day, to-wit, July 3, 1919, there was filed in the office of the Clerk of said Supreme Court, a certain Bond in the sum of $500, which bond was duly approved by the Chief Justice of said Court. A copy of said bond, its approval endorsed thereon, is hereto attached, marked Exhibit "C".

164 EXHIBIT C.

H. C. Lindsay.

Know all men by these presents, That Postal Telegraph-Cable Company as principal, and American Surety Company of New York as surety, are held and firmly bound unto the city of Fremont in the sum of Five Hundred ($500.00) dollars, to be paid to the said City of Fremont, to which payment well and truly to be made we bind ourselves jointly and severally by these presents.

Sealed with our seals and dated this 2nd day of July, 1919.

Whereas, the Postal Telegraph-Cable Company has sued out a writ of error from the United States Supreme Court to the Supreme Court of the State of Nebraska, to reverse the judgment of the Supreme Court of the State of Nebraska, rendered on the third day of May, 1919, in the suit of the City of Fremont against Postal Telegraph-Cable Company.

Now therefore, the condition of this obligation is such that, if the above named Postal Telegraph-Cable Company, plaintiff in error, shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged, if they shall fail to make good their plea, then this obligation is to be void; otherwise to remain in full force and effect.

POSTAL TELEGRAPH-CABLE COMPANY, [SEAL.]
By DYSART & DYSART,
Its Attorneys.
AMERICAN SURETY CO. OF NEW YORK, [SEAL.]
By S. H. GRIFFIN,
Resident Vice Pres.

Attest:
PHILIP POTTER,
Res. Ass't Secretary.

Approved this 3 day of July, 1919.

A. M. MORRISSEY,
Chief Justice of the Supreme Court of Nebraska.

(Endorsed:) General No. 20419. In the Supreme Court of the State of Nebraska. City of Fremont, Nebr., plaintiff and appellee, v. Postal Telegraph-Cable Company, a Corporation, defendant and appellant. Bond. Supreme Court of Nebraska. Filed July 8, 1919. H. C. Lindsay, clerk. J. T. Dysart, att'y for defendant,

165 And on this same date, to-wit, July 3, 1919, there was filed in the office of the Clerk of said Supreme Court, a certain writ of error, with the allowance thereof endorsed thereon, said original writ of error, marked Exhibit "E" is hereto attached.

166 EXHIBIT E.

H. C. Lindsay.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Nebraska before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the City of Fremont and Postal Telegraph-Cable Company wherein was drawn in question the validity of a statute of, or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, a manifest error hath happened to the great damage of the said Postal Telegraph-Cable Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all *those* concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date thereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of
167 the United States, the 3 day of July, in the year of our Lord one thousand nine hundred and nineteen.

[Seal United States District Court, District of Nebraska, Omaha Division.]

R. C. HOYT,
Clerk of the U. S. District Court for the District of Nebraska.

Allowed by

A. M. MORRISSEY,
Chief Justice of the Supreme Court of the State of Nebraska.

168 [Endorsed:] In the Supreme Court of the State of Nebraska. 20419. City of Fremont, Nebr., Plaintiff and Ap-

pellee, vs. Postal Telegraph-Cable Company, a corporation, Defendant and Appellant. Supreme Court of Nebraska. Filed Jul-3, 1919. H. C. Lindsay, Clerk. Writ of Error. J. T. Dysart, Att'y for Defendant.

169 And afterwards, towit, on July 5, 1919, there was issued out of said Supreme Court of Nebraska a certain Citation, which Citation was, on the 7th day of July, 1919, returned to the said Supreme Court with service thereof acknowledged, and was filed in the office of the Clerk of the Supreme Court. Said original Citation, with acknowledgment of service thereon, is hereto attached, marked Exhibit "F."

170 EXHIBIT F.

H. C. Lindsay.

Supreme Court of the State of Nebraska.

No. 20419.

CITY OF FREMONT,

vs.

POSTAL TELEGRAPH-CABLE COMPANY.

Citation.

UNITED STATES OF AMERICA, *ss:*

To City of Fremont, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty days from the date of the service of this citation, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of Nebraska, wherein the Postal Telegraph-Cable Company is plaintiff in error and you are defendant in error, to show cause, if any there by, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the hand and seal of the Honorable, the Chief Justice of the Supreme Court of Nebraska, this 3 day of July, in the year of our Lord one thousand nine hundred and nineteen.

A. M. MORRISSEY,
Chief Justice of the Supreme Court of Nebraska.

Attest:

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.
By ——— ———,
Deputy.

Service of the above citation is hereby duly accepted.
July 5, 1919.

W. M. CAIN,
171 *City Attorney for the*
City of Fremont.

[Endorsed:] In the Supreme Court of the State of Nebraska. 20419. City of Fremont, Nebr., Plaintiff and Appellee, vs. Postal Telegraph-Cable Company, a corporation, Defendant and Appellant. Citation. Supreme Court of Nebraska. Filed Jul. 7, 1919. H. C. Lindsay, clerk. Dysart & Dysart, Att'y for Defendant.

172 And on the same date, towit, July 7, 1919, there was filed in the office of the Clerk of said Supreme Court of Nebraska, a certain Præcipe for a transcript of the record and proceedings on this appeal, with proof of service endorsed thereon, which said original Præcipe, with proof of service, is hereto attached, marked Exhibit "G."

173 EXHIBIT G.

H. C. Lindsay.

In the Supreme Court of the State of Nebraska.

No. 20419.

THE CITY OF FREMONT, NEBRASKA, Plaintiff and Appellee.
v.
THE POSTAL TELEGRAPH-CABLE COMPANY, a Corporation, Defendant and Appellant.

Præcipe for Transcript.

To the Clerk of the Supreme Court of the State of Nebraska:

You will please make up a transcript in the proper form for the review of the above case in the Supreme Court of the United States, said transcript to contain copy of all records and proceedings in your said court in said case.

DYSART & DYSART,
Attorney for Defendant and Appellant.

Service of the above præcipe and receipt of a copy thereof acknowledged by me this 5th day of July, 1919.

W. M. CAIN,
City Attorney for the City of Fremont, Nebr.

174 SUPREME COURT,
State of Nebraska, ss:

Certificate of Lodgment.

I, H. C. Lindsay, clerk of said court, do hereby certify that there was lodged with me as such clerk on July 3, 1919, in the matter of City of Fremont vs. Postal Telegraph-Cable Company:

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth,—one for the defendant, and one to be filed in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Lincoln, Nebraska, this July 19, 1919.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska.

175 SUPREME COURT,
State of Nebraska, ss:

Authentication of Record.

I, H. C. Lindsay, clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to 174, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of City of Fremont v. Postal Telegraph-Cable Company, No. 20419, and also of the opinion of the court rendered therein, as the same now appear on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Lincoln, Nebraska, this July 19, 1919.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska.

176 UNITED STATES OF AMERICA,
Supreme Court of Nebraska, ss:

Return to Writ.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified

transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Nebraska, in the City of Lincoln, this July 19, 1919.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska.

Costs of this record:

Preparing transcript	$43.25
3 Certificates and Seals	1.50
Binding	.75
	$45.50

Paid by Appellant.

H. C. LINDSAY,
Clerk.

Endorsed on cover: File No. 27239. Nebraska Supreme Court. Term No. 484. Postal Telegraph-Cable Company, plaintiff in error, vs. The City of Fremont. Filed August 6, 1919. File No. 27239.

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Supreme Court of the United States

OCTOBER TERM, 1919.

No. 484.

POSTAL TELEGRAPH-CABLE COMPANY,

Plaintiff in Error,

versus

THE CITY OF FREMONT,

Defendant in Error.

In Error to the Supreme Court of the State of Nebraska.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action was instituted in the District Court of Dodge County, in the State of Nebraska, by the City of Fremont in that State, to recover of the Postal Telegraph-Cable Company the license fees imposed by that City upon the telegraph company as an occupation or privilege tax for doing a telegraphic business in that State for the years 1914

and 1915. The ordinance imposing the tax, *in terms*, restricted it to business done within the State and excluded business for the government and such as is interstate commerce. The Postal Telegraph-Cable Company defended upon the ground, among others not involved here, that the tax, while, under the *language* of the ordinance, is restricted to intrastate business of the Company, is in *effect* an imposition upon its interstate business. The District Court directed a verdict for the City and the Company appealed to the Supreme Court of Nebraska, which affirmed the judgment, and a writ of error was awarded to this court.

ASSIGNMENTS OF ERROR.

1. The Supreme Court of Nebraska erred in holding that the ordinance was not in conflict with Section Eight of Article One of the Constitution of the United States.

2. The Court erred in holding that ordinance did not violate the Fourteenth Amendment of the Constitution of the United States.

GENERAL STATEMENT OF FACTS.

1. The City of Fremont is a municipal corporation and imposes an occupation or license tax on telegraph companies for the privilege of doing business within the State.

2. By State statute any company doing an interstate business in the State is required also to do an intrastate business.

3. The Postal Telegraph-Cable Company is engaged in sending interstate messages at Fremont. Its business is es-

sentially interstate and it does not cater for local business, as is shown by the fact that it has only nineteen offices in the entire State of Nebraska, while the Western Union Telegraph Company, which bids for the local business, has six hundred and thirty-two. (Record p. 76).

4. The net receipts from the Company's intrastate business at Fremont are insufficient to pay the tax, which if compelled, must be paid from the Company's interstate business.

For convenience the evidence supporting the foregoing simple statement of facts will be brought to the attention of the Court.

1. The Ordinance. (Rec. p. 6).

The tax is imposed by the following ordinance of the City of Fremont:

> "Section 311. Levied. That there is hereby levied a license tax on each and every occupation and business within the limits of this city, in this section enumerated to raise revenue thereby in the several different sums on the several different businesses and occupations as follows:
>
> "Telegraph Offices.—The sum of sixty dollars per year on the business and occupation of receiving messages in the city from persons in this city and transmitting the same by telegraph from this city within this state to persons and places within this state, and receiving in this city messages by telegraph transmitted within this state from persons and places within this state to persons within this city, and delivering the same to persons in this city,

excepting the receipt, transmission and delivery of such messages, to and from any department, agency or agent of the United States, and excepting the receipt, transmission and delivery of any such messages which are interstate commerce; the business and occupation of receiving, transmitting and delivering of the messages herein excepted is not taxed hereby."

2. Interstate Companies Compelled by State Statute To Do the Business Taxed by the Foregoing Ordinance.

One of the most important facts to be considered is that if the Company engages in interstate commerce at Fremont, it is required by state statute to do also the business taxed by the ordinance, and at a rate prescribed by the statute. This requirement is contained in Section 7408 of the Statutes of 1913 which reads as follows:

> "Every telegraph company engaged in the business of receiving and transmitting messages or telegrams in this state, whether incorporated under the laws of this state, or the laws of any other state or territory, or by virtue of the laws of the United States, shall when required by any person or persons to transmit any message or telegram from any point in this state to any other point in this state, and over lines owned, operated and controlled by such company, receive and transmit such message or telegram. For such service such telegraph company shall make no greater charge than the sum of twenty-five cents for each message or telegram, not exceeding ten words in length so received and transmitted and not exceeding the rates collected on January 1st, 1913, for each additional word in such message."

3. The Receipts from the Company's Intrastate Business Was Insufficient To Pay the Tax, and Therefore Payment, if Compelled, Must Be Made From Interstate Receipts.

This court, in the recent case of *Postal-Telegraph-Cable Company* v. *Richmond*, 249 U. S. 252, declared that if the facts were that the net receipts from the intrastate business were insufficient to pay the tax "it well might be that the tax would be invalid." It is desired, therefore, that the proof of such facts in the instant case should be brought specifically to the attention of the court.

It should suffice that the Supreme Court of Nebraska found as a fact that the intrastate business of the Company at Fremont was done at a loss and that its net receipts therefrom were consequently insufficient to pay the tax. Such finding of facts is declared in the opinion of the court where it is said (Rec. p. 97):

> "The proof in support of these allegations shows that during the years 1914 and 1915 defendant's Fremont office was operated at a loss and that a payment of the tax for these two years would occasion deficits on defendant's intrastate business at Fremont of $143.73 and $128.45, respectively."

Upon this finding of facts the Supreme Court of Nebraska based its construction of the ordinance involved and its decision sustaining its constitutionality. The findings of facts made in the highest court of a state is binding upon the Supreme Court of the United States and will be the basis of decision there.

Adams v. *Church*, 193 U. S. 510; *Republican River Bridge Co.* v. *Kansas, etc., Ry. Co.*, 92 U. S. 315; *Dewer* v. *Richards*, 151 U. S. 658; *Egan* v. *Hart*, 165 U. S. 188; *Lombard* v. *W. Chicago*, 181 U. S. 33, 40; *Andrews* v. *Eastern Oregon Land Co.*, 203 U. S. 157; *Gulf, etc., R. Co.* v. *Texas*, 204 U. S. 403.

If this court will review the facts as found by the Supreme Court of Nebraska, the evidence, it is submitted, fully sustains such findings, and clearly and fully proves, that the intrastate receipts of the Company are insufficient to pay the tax. It must be observed that the evidence is wholly in support of the fact and that the City has not attempted to contest or challenge its sufficiency and correctness.

It is shown by the evidence of Mr. Cardona, Treasurer of the Company, (Record p. 81), that the *gross* receipts from intrastate business in 1914 were $108.28, and for the year 1915 $83.96. The tax of $60.00 was, therefore, 55% of the *gross* receipts in 1914, and 71% in 1915. May we pause in the statement of fact to observe that to compel the Company to do this business, if it shall exercise its right to engage in interstate commerce and then to require 71% *not of the net receipts, but of the GROSS receipts* from such business, is not only unreasonable but shocking! And the reflection cannot be escaped that if every city in which the Company operates in interstate commerce should compel also an intrastate business and demand 71% of the gross receipts, the company would become bankrupt and its interstate business would be not only burdened but destroyed. Of course, if it would be unreasonable for all the cities so to do, it is unreasonable for Fremont.

But this is not all. It appears from the evidence that the expense of operating this intrastate business is greater than the receipts. Mr. Cardona testifies (Rec. p. 81) that the intrastate expenses for the year 1914 were $168.81 and in 1915 $133.60, making a deficit, if the tax of $60.00 shall be included, of $134.73 in 1914, and of $128.45 in 1915.

These figures result from an apportionment of the expenses between interstate and intrastate business according to the receipts which reflect the volume of each business and its consequent expense. The apportionment, as made, is shown to be correct by the evidence of Mr. Reynolds (pages 61 to 71 of the Record) and of Mr. Cardona (page 80 of the Record). Mr. Reynolds, who is Vice-President and General Manager of the Company, has been with it for thirty-five years, serving in almost every capacity, from office boy to Vice-President and General Manager. He gives a most interesting, instructive and lucid explanation of the nature of the telegraph business and the manner in which it is conducted.

Interstate and intrastate messages are, of course, handled by operators and instrumentalities indiscriminately and it would, therefore, be impossible to separate each item of service as being chargeable to any particular message. But such accounting is not necessary to determine the expense of each branch of the business; for such is the character of the telegraphic business that when the total expense is known, and it is also known what part of the work done was interstate and what part intrastate, the proportion of the expense chargeable to either service is not an estimate or problematical calculation, but it is a simple and certain

matter of arithmetical proportion. This results from the fact that the telegraphic business, unlike railroading, involves no outlay for different sorts of traffic. Its operations are uniform and consist in doing only one thing and in one manner, viz: the transmission of words by electric current, where the transmission is the same and there is no difference in weight, value, labor or time, whether the message be interstate or local. Mr. Reynolds plainly points out that there is no difference in the expense of the transmission of intrastate and interstate messages and each item of expense is analyzed by him and shown to apply alike to each branch of the business. Both require the same messenger service, the same operator's time, the same instrumentality. And interstate messages "are not transmitted, on the average, over a greater distance on the telegraph company's lines than intrastate messages, this being due to the zigzag method in which intrastate messages are necessarily handled as compared with direct routes traversed by interstate messages." These facts are not, and cannot be, controverted. It results, therefore, that the expense of each business is in proportion to the comparative volume of each business. Mr. Reynolds points out on page 67 of the record that the rate is the same for similar service in each branch and it follows, of course, that the receipts therefore show the volume of each branch of the business. This one thing is certain that since the rate allowed to be charged for intrastate messages is the minimum, any proportion of expense according to the ratio of receipts, must be favorable to the intrastate business, where both messages bear the same expense.

On page 69 of the record will be found the figures showing exactly how many intrastate messages and how many

interstate messages were sent in the years involved in this controversy. These figures disclose what part of service was interstate and what part intrastate, and make certain what part of the expense for the whole service should be borne by each branch.

ARGUMENT AND AUTHORITIES.

Under the foregoing facts we submit that the tax is invalid as applied to the Postal Telegraph-Cable Company:

1. Because the receipts from the compelled intrastate business are not sufficient to pay the tax, and it therefore falls upon interstate commerce.

2. Because the Company is required by the ordinance of Fremont, taken in conjunction with the Statute of Nebraska, to pay this tax as a condition upon its interstate business.

1. In *Postal Telegraph-Cable Company* vs. *Richmond*, 249 U. S. 252, in which a similar contention was made, the court said:

> "If the facts were as thus asserted it well might be that the tax would be invalid."

The precise question here raised was presented to this court in *Pullman Company* v. *Adams*, 189 U. S. 420. In that case, the State of Mississippi was undertaking to collect a license tax from the Pullman Company for business done by it *within* the State. The Pullman Company offered, as a defense, evidence which showed that the receipts from its *intrastate* business, after paying the expenses charge-

able against it, were not sufficient to pay the tax, and that, consequently, the tax was in fact a burden upon its interstate commerce since the Constitution of Mississippi made them common carriers and they were therefore compelled to accept local passengers. This court held that if they were so compelled to accept local passengers the invalidity of the tax would be assumed.

Mr. Justice Holmes said:

> "The Company attempted by pleas and by an offer of evidence to bring before the court the fact that its receipts from this class of passengers did not equal the expenses chargeable against such receipts. It contended that these facts would show that the business within the state was merely a burden on its commerce between the states, while at the same time, it argued, it was compelled to assume that burden by §195 of the State Constitution, which declares sleeping car companies to be common carriers and subject to liability as such. The pleas were held bad on demurrer, the evidence was rejected and the jury was instructed to find for the plaintiff on the facts admitted. These rulings and the refusal of the court to declare the above-mentioned §3387 unconstitutional are the errors assigned.
>
> If the clause of the State Constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the State Constitution and the statute combined would impose a burden on commerce between the state analogous to that which was held bad in *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. Ed. 649, 11 Sup. Ct. Rep. 851."

It cannot effect the result in this case that the ordinance in terms limits the tax to business done within the State and expressly disavows any intention of taxing interstate commerce.

This court has frequently and repeatedly held that in determining whether a tax has such a direct relation with interstate commerce as to be an exercise of power prohibited by the commerce clause, the court will regard the substance of the exaction,—its operation and effect as enforced,—and cannot depend upon the manner in which the taxing scheme has been characterized.

Kansas Ry. v. *Kansas*, 240 U. S. 227;
St. Louis v. *Arkansas*, 235 U. S. 350;
U. S. Ex. Co. v. *Minn.*, 223 U. S. 335;
W. U. T. Co. v. *Kansas*, 216 U. S. 1;
Galveston, &c. R. Co. v. *Texas*, 210 U. S. 217;
Crutcher v. *Kentucky*, 141 U. S. 47.

The burden of this tax is inseparable from interstate commerce. Under the Nebraska statute the Company cannot engage in interstate commerce at Fremont and avoid this tax. If it does an interstate business, it must do also an intrastate business and pay this tax. If the intrastate business is insufficient to pay it, the only alternative left to the Company is to pay the tax from its interstate commerce or else to cease to do an interstate business. It no longer has the option to refrain from doing intrastate business and continue its interstate business. Can it be said that an occupation tax exacted for doing an intrastate business, the

effect of which is to require the telegraph company to pay it out of its interstate business or cease to do such business, is not a burden upon or interference with interstate commerce? It is dallying with the Constitution to say that a state cannot tax interstate commerce or burden it or interfere with it, and yet uphold a city ordinance which, taken in connection with a state statute, would require a company doing interstate business to pay, out of the earnings of such business, a tax purporting to be levied upon intrastate business, or else surrender its interstate business.

The Supreme Court of Nebraska finds that the facts as are stated herein, but holds that notwithstanding the insufficiency of the intrastate receipts to pay the tax, it is not unreasonable or invalid, because:

(1). The loss in intrastate business may be due to conditions for which the telegraph company may itself be responsible; and

(2). The deficit might possibly be made good from other intrastate business.

With greatest deference and respect we submit that such position will not stand the test of scrutiny and reason. The learned and distinguished court, evidently failed, in its reasoning, to give consideration to the *important fact that the state statute compelled the Company as a condition to its interstate business, to do this losing business at Fremont.* If it were true that the local business was unprofitable by reason of the unsuccessful management or method of the Company, or that the deficit could be supplied from other profitable intrastate business at some other point in the state, it nevertheless remains true that the intrastate busi-

ness at Fremont is a loss to the Company and a burden to carry. And it cannot renounce the unprofitable business unless it shall also renounce its interstate business at Fremont. So, we say, that to whatever cause the loss may be attributed, or whether the other intrastate business may be sufficient to cover it, the loss is suffered because the Company engages in interstate commerce at Fremont and cannot refuse the unprofitable business.

2. In the second place, we submit that, even if it were not shown that the receipts from the intrastate business of the Company were insufficient to pay the tax, it would still be invalid for the effect of the ordinance, when taken in conjunction with section 7408 of the Nebraska statutes, is to impose a tax because the defendant does an interstate business at Fremont, and the tax is, therefore, upon that business.

That a tax may be imposed by a municipality upon the privilege of doing an intrastate business although the telegraph company does also an interstate business, will not be questioned. Such was the decision of this court in *Postal Telegraph-Cable Company* v. *Charleston*, 153 U. S. 692, and cases subsequent thereto. But to justify such a tax, the telegraph company should be free to engage in such business, or not to engage in it as it wills. The Company should have the right to renounce the intrastate business and avoid the tax without, in any way, interfering with its right to carry on its interstate business. In this case, however, the telegraph company cannot renounce this intrastate business and relieve itself of the tax without renouncing also its interstate business. It is this which clearly distinguished this case from the Charleston case. The tax in this case is im-

posed upon a business which the telegraph company is compelled to do if it does an interstate business there.

We assert the proposition as indisputable that no tax can be imposed upon any business which is required to be done as additional to interstate commerce, without being in some measure a burden upon that commerce. We therefore submit, that, whether the intrastate business of the Company at Fremont is sufficient to pay the tax or not, when the State of Nebraska and its subordinate municipality compel a telegraph company engaged in interstate commerce, to engage also in local commerce and to pay a tax therefor, such tax is necessarily a regulation of, and a burden upon, the Company's interstate commerce. Peculiarly applicable is the plain language of this court in *Western Union Telegraph Company* v. *Kansas*, 216 U. S. 1:

> "We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulation, which under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States."

The compulsion of the telegraph company to transmit messages inside the State, and to pay a tax therefor, if it engages in interstate commerce, amounts to a prohibition of the interstate commerce if the Company refuses to do the intrastate business. And it is plain, that if the right of the

State or its political subdivisions, to tax such compulsory intrastate business, is sustained, such tax might easily be placed at such amount as to prohibit the Company from engaging in interstate commerce in that jurisdiction.

In *Leloup* v. *Mobile*, 127 U. S. 649, this court said:

> "Can a state prohibit such a company from doing such business within its jurisdiction unless it will pay a tax and procure a license for the business? If it can, it can exclude such companies and prohibit the transaction of such business altogether. We are not prepared to say that this can be done."

The result of this City and State legislation is to interfere with the Postal Telegraph-Cable Company in its business of transmitting messages between the states,—its interstate commerce. All acts producing any such results are to that extent unconstitutional and void. *Crutcher* v. *Kentucky*, 141 U. S. 47.

The theory upon which an occupation tax on intrastate business upon a company doing both an intrastate and an interstate business has been held valid, is that the company doing interstate business could avoid the tax, if desired, by refusing the intrastate business and thereby carry on the interstate commerce, unaffected by the tax.

In *Pullman Company* v. *Adams*, 189 U. S. 420, the court, after declaring that if the Constitution compelled the company to carry passengers between points within the state, the tax would be invalid, said:

> "On the other hand, if the Pullman Company, whether called a common carrier or not, had the

> right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case is governed by *Osborne* v. *Florida,* 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce."

The decision in *Osborne* v. *Florida,* referred to in the above citation, had held that the decision of the state court, construing the effect of its statute, was binding, and it is interesting and instructive therefore to consider the opinion of the State court in the *Osborne* v. *Florida* case. The case in the State court is found in 33 Fla. 162, and the Chief Justice of that court in delivering the opinion, referring to the fact that the company was engaged in both interstate and intrastate business, said:

> "Engaging in the former business does not necessitate his engaging in the latter, and if he does not engage in the latter the former is in nowise burdened, or even affected, by the tax or the statute, but, on the contrary, he is as free to carry on interstate commerce unaffected by the provisions of this act as if it was not on the statute books."
>
> * * * * * *
>
> "If the person engaging or proposing to engage in interstate commerce express business finds that to engage in express business which is state commerce will or may take some of his interstate commerce express earnings to pay the license tax or fees of the state commerce business, he has only to refrain from the latter business to avoid incurring such exaction from such earnings."

The Nebraska statute, as is seen, will not permit the renunciation of the domestic business and this effect of the

statute is recognized by the Supreme Court of Nebraska in its opinion in this case, and it is submitted that such is binding upon this court.

The Supreme Court of Nebraska suggests that, where the revenue from intrastate business is insufficient to meet the tax imposed, a remedy is provided in the succeeding section 7409. This section contains a provision by which the telegraph company may apply to the State Corporation Commission for a permit to increase its rates. It is plain, however, that the telegraph company could not increase its revenue by increasing its rate while the Western Union Telegraph Company permitted its rate to remain at the same thing.

But further than this, the increase in rates, if permitted, would necessitate the regulation generally as to rates of the company over its system and would cause the statutes to be in direct conflict with the Act of Congress of June 18, 1910, placing telegraph companies under the control of the Interstate Commerce Commission.

We, therefore, submit that the effect of the ordinance of the City of Fremont imposing the tax, is to regulate, interfere, and burden the Postal Telegraph-Cable Company in its business of transmitting messages in interstate commerce, and that in compelling the telegraph company to do the business for which a tax is imposed is also taking the defendant's property without due process of law, and that the judgment of the Supreme Court of Nebraska should be reversed.

Respectfully submitted,

JOHN N. SEBRELL, JR.,
Attorney and Solicitor for Plaintiff in Error.

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Supreme Court of the United States

OCTOBER TERM, 1920.

No. 156.

POSTAL TELEGRAPH-CABLE COMPANY,

Plaintiff in Error,

versus

THE CITY OF FREMONT,

Defendant in Error.

In Error to the Supreme Court of the State of Nebraska

REPLY BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

JOHN N. SEBRELL, JR.,
Attorney and Solicitor for Plaintiff in Error.

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THE CITY OF FREMONT,

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In Error to the Supreme Court of the State of Nebraska

REPLY BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

In our original brief we asserted three facts:

1. That the Postal Telegraph-Cable Company was engaged in telegraphing messages in interstate commerce at Fremont, Nebraska.

2. That being so engaged, a statute of Nebraska required them to transmit messages from point to point within the State, for the doing of such compulsory business the City of Fremont imposed an occupation tax of Sixty Dollars ($60.00) per year.

3. That the receipts of the Postal Telegraph-Cable Company from its intrastate business at Fremont were not sufficient to pay the tax, which, if paid, must come from its interstate commerce.

It is contended by defendant-in-error that each of the foregoing propositions "has been clearly decided adversely to it [the Telegraph Company] by this court and others and in most of which cases appellant was a party." It has been held by this court that a state, (and a city, when authorized by a state), may impose a license tax on the intrastate business of a telegraph company notwithstanding the telegraph company is also engaged, in that state, in interstate commerce.

Postal Telegraph-Cable Co. v. Charleston, 153 U. S. 692;
Postal Telegraph-Cable Co. v. Richmond, 249 U. S. 252.

In each of the cases cited, the intrastate business of the telegraph company was not required as a condition to the company's right to engage in interstate commerce. This court has never held that the state can impose a tax upon an intrastate business which the telegraph company is compelled, by statute, to engage in, because it does an interstate business. In the Richmond case, supra, it was expressly

declared that the tax was allowable only "where the tax does not burden, or discriminate against interstate business, and the local business is so substantial that it does not clearly appear the tax is a disguised attempt to tax interstate commerce."

This court has never failed to hold that it is beyond the power of the state, by any device or in any way, to burden the interstate commerce of a corporation, whether by taxes or otherwise.

In Crutcher v. Kentucky, 141 U. S. at page 62, this court said:

> "This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate any more than upon foreign commerce; *and that all acts of legislation producing any such result are, to that extent, unconstitutional and void.*" (Italics supplied.)

In Western Union Tel. Co. v. Kansas, 216 U. S. 1, it is said:

> "It is to be deduced from the adjudged cases that a corporation of one state, authorized by its charter to engage in lawful commerce among the states, may not be prevented by another state from coming into its limits for all the legitimate purposes of such commerce. It may go into the state without obtaining a license from it for the purpose of

its interstate business, and without liability to taxation there on account of such business." (Italics supplied.)

REASONABLENESS OF THE TAX AS APPLIED TO A CLASS NOT THE POINT IN ISSUE.

It is contended by the defendant-in-error that the tax is reasonable as applied to a class and that its reasonableness can not be determined because it works a hardship upon the Postal Telegraph-Cable Company which is only one of the class,—that it cannot be valid as to one of the class and invalid as to another.

Such reasoning has no application where, as in this case, because the telegraph company engages there in interstate commerce it is compelled to become one of the class and to assume its full burdens.

We recognize and admit the right of the sovereign State of Nebraska, and the municipalities authorized by it, to impose occupation taxes upon all who voluntarily seek to do an intrastate business under its classification, provided they do not thereby interfere with interstate commerce. But we deny the right of the State, or its subordinate municipality, to compel everyone engaged in interstate commerce to accept the burdens of that classification. We deny the right of the State of Nebraska and the City of Fremont to say to the Postal Telegraph-Cable Company, if you engage in interstate commerce in that State and City you shall be classified with telegraph companies engaged in

domestic commerce and shall pay the tax imposed upon that class whether it shall prove a burden upon your interstate commerce or not. Suppose the Western Union Telegraph Company, with its equipment for domestic business, realized in a certain year a profit from its domestic business at Fremont of $5,000.00, while the total business of the Postal Telegraph-Cable Company, both domestic and interstate, amounted to only $1,000.00. Could the City of Fremont impose a revenue tax of $1,500.00 upon telegraph companies as a class, thereby totally destroying the interstate business of the Postal Telegraph-Cable Company, while defending the tax because it was not unreasonable as to the other company? The tax would be invalid as to the Postal Telegraph-Cable Company, not because it was unreasonable as a tax upon telegraph companies as a class, doing domestic business within the state, but because the tax would interfere with its interstate business, the pursuit of which is denied by the state unless the tax is paid.

The fallacy in the argument of defendant-in-error, we submit with great respect, is that they consider the ordinance involved as applying to a business which the plaintiff-in-error might engage in or not at its pleasure, and failed, seemingly at least, to give consideration to the very crucial and determinative fact that the business, which is the subject of the objectionable tax, is by the statute law of the state made compulsory upon companies engaged in interstate commerce.

The cases cited by defendant-in-error, holding that the reasonableness of the tax is not to be measured by the profits of the business, involved no consideration of inter-

state commerce, and, for that reason, have no application to the case in judgment and are clearly distinguishable therefrom.

SUPERVISION AND FRANCHISE.

It is also contended by defendant-in-error that the matter of supervision and franchise may be an element in fixing an occupation tax and that element, of itself, would justify a tax of the amont levied by this ordinance. It must be a sufficient answer to this contention simply to refer to the ordinance itself, which imposes a tax, not for supervision and inspection, but "on the business and occupation of receiving messages * * * and transmitting the same." The case of Chester City v. Western Union Telegraph Company, 154 Pa. 464, and others of like character, cited in the brief of defendant-in-error in support of this contention, involved a license fee upon poles, and the principles applicable to such cases have been held by this court to be different from those in which a privilege or occupation tax is imposed. The one is a police regulation which may be imposed even upon the instrumentalities of interstate commerce, while the other is a revenue tax from which interstate commerce is exempt.

In Brooklyn v. New York, etc., 199 U. S. 48, a license fee was defined by this court as "a charge for the privilege of carrying on a business or occupation and is not the equivalent or in line of a property tax."

And in Postal Telegraph-Cable Company v. Taylor, 192 U. S. 64, the language of the court is very pertinent to the present discussion when it said:

> "When we come to an examination of the grounds upon which this kind of tax is justified, and when we find that in this case each one of these grounds is absent, how is it possible to uphold the validity of such an ordinance? To uphold it in such a case as this, is to say that it may be passed for one purpose and used for another; passed as a police inspection measure, and used for the purpose of raising revenue; that the enactment as a police measure may be used as a mere subterfuge for the purpose of raising revenue and yet because it is said to be an inspection measure, the court must take it as such and hold it valid, although resulting in a rate of taxation, which, if carried out throughout the country, would bankrupt the company were it added to the other taxes properly assessed for revenue and paid by the company. It is thus to be declared legal upon a basis and for a reason that do not in fact exist."

ESTOPPEL.

It is contended that the company is estopped to allege the invalidity of the ordinance because it applied for a franchise authorizing it to place its poles and wires along the streets of Fremont, with full knowledge of the existence of this ordinance, and that they paid the tax without complaint until the year 1910.

The request for a franchise was to enable the company to establish its line of poles and wires upon the streets of Fremont for the purpose of interstate commerce, a right which the City of Fremont could regulate but could not refuse.

New England Tel. Co. v. Essex, 239 U. S. 313.

There is nothing in the record which shows whether the interstate business done by the company at Fremont during the first six years of its business was or was not sufficient to take care of the tax imposed. But, if not and the company continued to pay for six years the tax out of its interstate receipts, whether in the hope that its business would increase, or for other reasons, the company cannot be denied the right of resisting the tax which time has shown to be invalid. The failure of the company previously to contest the validity of the statute could certainly not cure its invalidity.

INTRASTATE RECEIPTS INSUFFICIENT TO PAY THE TAX.

It is suggested in the argument of the learned attorneys for the City of Fremont that the insufficiency of the intrastate receipts of the company to pay the tax is shown by a formula devised by an officer of the company, determining the division of the costs and expenses between interstate and intrastate business, and, it is said, that such was not sufficient in the case of Postal Telegraph-Cable Company against Richmond, 249 U. S. 252.

The Supreme Court of Nebraska in the opinion by its Chief Justice, in this case, declared:

> "The proof * * * shows that during the years 1914 and 1915 defendant's Fremont office was operated at a loss and that a payment of the tax for these two years would occasion deficits on defendant's intrastate business at Fremont of $143.73 and $128.45, respectively."

In view of this finding of the fact by the court, which we understand is binding upon this court, we deemed it unnecessary to go into specific detail, as to this proof, in our original brief, and it is perhaps unnecessary now, notwithstanding the suggestion of its insufficiency by counsel for defendant-in-error, for it appears that the entire business at Fremont both domestic and interstate were done at a loss, and that it could matter little by what formula or means the expense should be divided between the two.

This case was prepared for trial after the decision of Postal Telegraph-Cable Company v. Richmond, supra, by this court, and it was fully realized that the decision in that case was adverse because of the insufficiency of the proof alone, and, naturally, care was exercised to meet and overcome in this case the objections to the proof which was found in that. The criticism of the proof in the Richmond case was as to the inadequacy of the data furnished by the record for the testing of the validity of the formula devised for the division of the expense. In this case, the depositions of witnesses duly taken and not the affidavits, criticized in the Richmond case, are the means through which the witnesses testify, and the books of the company presented in

evidence, together with the evidence of Mr. Reynolds, Mr. Cardona and others, supply the data. It has been shown that the local expenses at the Fremont office for the year 1914 were $1,287.39, of which amount $165.81 was chargeable to the intrastate business. Of course, it is proper that a part of that expense should be chargeable to the intrastate business.

Western Union Tel. Co. v. City of Fitzgerald, (Ga.) 100 S. E. 104;

Postal Telegraph-Cable Co. v. City of Cordele, 141 Ga. 658; 82 S. E. 26.

The testimony of Edward Reynolds, (Rec. pp. 55-71) shows, in detail, how the expense was incurred (Rec. p. 69), and what part was incurred, respectively, in the intrastate and the interstate business of the company at Fremont.

The proof shows that during the year 1914, 2256 messages were sent from the Fremont office. Of these, 292 were intrastate messages. Each item in the aggregate of expenses will be seen to apply alike to interstate and intrastate messages. For instance, the first item of expense incurred is the pay of the messenger who is sent for the message. This, of course, is the same for an intrastate message as it is for an interstate message. Can there be any doubt, therefore, that the ratio of expense from this item between the intrastate and the total expense is that of 292 to 2256 or .1339%. The other items of expense, enumerated on page 69 of the record, and which aggregate the total expense charged, are manifestly subject to the same ratio. The operators who handled the business con-

sumed .1339% of their time in the intrastate business and .1339% of the business in which the equipment was employed was intrastate. The intrastate business should, therefore, bear .1339% of the expense. The data furnished in this case goes into, even, further detail. It shows the average cost of each item of expense in each message. The total of these multiplied by the number of intrastate messages sent, give, with mathematical certainty, the expenses incurred in the company's intrastate business. The corresponding figures for 1915 are also given. And so it appears that the apportionment of expense between interstate and intrastate business has been fairly and reasonably made. It will be observed that the expense which has been charged to the company's intrastate business is confined to the local expense at the office at Fremont, and does not include any maintenance of line or any other expense except such as is had in operating the office at Fremont. There is nothing included for overhead expense, depreciation, interest on investment, nor even the *ad velorem* taxes paid by the telegraph company to the State of Nebraska and the City of Fremont. It is found that the expenses, thus restricted, exceed the receipts.

It may be said in this case, that, whatever the means of apportionment, the expense will exceed the receipts because the entire business was done at a loss and the local expense of the office itself was more than the combined business of the company at that point.

It is further suggested that if the intrastate receipts at Fremont were not sufficient to pay the tax imposed, it would not thereby follow that the deficit must be made up

from the interstate business of the company but would be a charge upon the revenue which the company obtains from its intrastate business as a whole. There is nothing in the record showing that there was any revenue from the company's intrastate business. The evidence is just to the contrary. On page 68 of the record, it will be seen that Mr. Reynolds testified: "I am prepared to state that the Postal Telegraph-Cable Company of Nebraska incurs an actual loss on these intrastate telegrams." But be this as it may, as is pointed out in our original brief, it is a fact that this loss, and the burden of this tax, is sustained by the company on account of its being engaged in interstate commerce at Fremont. And the license, for which this tax is required, gives to the telegraph company no privilege beyond the limits of the city.

ACT OF 1913.

Counsel for defendant-in-error suggests, with apparent doubt, however, that the Act of 1913 (which is the statute requiring interstate telegraph companies to transmit and deliver local messages), may not demand the construction we give it, so as to require the company to do an intrastate business at unremunerative points; that, if it is susceptible of such construction, it would, to that extent, be void.

The possible construction of the statute suggested by counsel has never been made by the Nebraska court, nor by the court of any other state having a similar statute. On the contrary, wherever the question has arisen, and the telegraph company has failed to transmit a local mes-

sage, the courts have been prompt to apply the statute and impose upon the telegraph company the penalty which the statute provided.

It is certain that the Supreme Court of Nebraska, in this case, did not hold that the company might relieve itself of the tax by declining the unprofitable business, but recognizing the compulsory character of the statute, declared that the remedy must be found in an invocation of Section 7409 of the statute which gave to the State Railway Commission of Nebraska the power to hear and determine whether or not the rates are so low as to be non-remunerative or unjust to the telegraph company; or else to supply the deficit which the compulsory statute had caused at an unremunerative point, from the profits at some remunerative point, if any there should be. In the opinion of the court in this case, the court said:

> "The argument on this point may be summarized as follows: Section 7408 Rev. St. 1913, requires the telegraph company to transmit messages, on demand, between its several offices in Nebraska. The intrastate receipts at defendant's Fremont office are insufficient to pay this tax together with other expenses. A portion of the tax must, therefore, be paid from the receipts on interstate business. Such payment casts a burden on interstate commerce and is violative of the Federal Constitution."

The court nowhere so much as suggests that the effect of the statute is not as argued. The court's answer to the argument was that the facts asserted, taken as true, do not impose a burden upon the interstate commerce, but,

that the deficiency at the Fremont office is to be supplied from the intrastate business of the company at its other points, and, should this not be sufficient, then the remedy of the company was to apply to the Railway Commission for a right to increase its rates under Section 7409.

But the language of the statute is itself so plain and direct that a proper construction thereof cannot well be misconceived. It will be observed that the statute makes no exception, but requires the transmission of any message or telegram from *any* point within the state to *any* other point in the state over lines owned, operated, and controlled by the company. The statute is as follows:

> "Every telegraph company engaged in the business of receiving and transmitting messages or telegrams in this state, whether incorporated under the laws of this state, or the laws of any other state or territory, or by virtue of the laws of the United States, shall when required by any person or persons to transmit any message or telegram from any point in this state to any other point in this state, and over lines owned, operated and controlled by such company, receive and transmit such message or telegram."

It is suggested that if the statute compels the company to do an intrastate business, it might be void. Such a result would depend upon whether the doing of an intrastate business would be an interference with interstate commerce, and this involves a question of fact on which the evidence in this case throws no light. It is entirely possible that

such business may be an aid to commerce, and legislation which is a mere aid to commerce may be enacted by a state, although incidentally it may affect commerce itself.

Western Union Tel. Co. v. James, 162 U. S. 650, 656;

Mobile Co. v. Kimball, 102 U. S. 691.

The City of Fremont is a part of the State Government, and it cannot be heard to allege the invalidity of an act which the State has adopted and the benefit of which it has received.

Pierce v. Summerset Ry., 171 U. S. 649.

But the act of the city, imposing a tax upon the business which the state statute compels interstate companies to do, is certainly a burden upon and an interference with such interstate commerce, and violates the right of the telegraph company to engage in interstate commerce at Fremont without interference by the city as guaranteed by the Constitution of the United States.

We submit, therefore, that this case differs from the ordinary occupation tax case for the reason that, in this case, the intrastate business and the interstate business have been bound together by the Act of 1913 and have, thereby, been made inseparable, for the reason that the statute prohibits the telegraph company from renouncing its intrastate business so long as it does an interstate business, and a tax cannot be applied to one without affecting the other. To the doing of an interstate business, the state has attached an intrastate business, and upon this intra-

state business the City of Fremont imposes a tax. The effect of this ordinance is to require the payment of the tax out of the funds of the company's interstate business, for, it cannot engage in its interstate commerce at Fremont unless it pays this tax, and the receipts from the business which is presumably taxed are insufficient to pay it.

The state courts are already beginning to recognize the invalidity of such taxation. In Postal Telegraph-Cable Company v. Cordele, 141 Ga. 658, 82 S. E. 26, the facts were identical with the facts in the instant case, except a difference in figures. A tax of $100.00 was imposed by the city ordinance upon the intrastate business of the company. Under an apportionment of expenses, as shown in this case, there was a deficit in its intrastate business, and the court held that an occupation tax of $100.00 was illegal and invalid.

In the case of Western Union Telegraph Company v. City of Fitzgerald, 100 S. E. 104, the gross receipts from the intrastate business of the Western Union Telegraph Company amounted to as much as $2,672.49, and yet the Supreme Court of Georgia held that a tax of $100.00 was unreasonable and invalid, since the expenses of the intrastate business, apportioned as in this case, when deducted from the gross receipts left a profit of $180.00. If an occupation tax of $100.00 was unreasonable where the telegraph company had a business amounting to $2,672.49, how can a tax of $60.00 be reasonable in Fremont where the gross receipts from the taxable business are only $83.96?

We respectfully submit, therefore, that the judgment of the Supreme Court of Nebraska should be reversed on

the ground that this tax is an interference with interstate commerce, and deprives the telegraph company of its property without due process of law, and is an excessive impost or duty; all in violation of the Constitution of the United States.

Respectfully submitted,

JOHN N. SEBRELL, Jr.,

Attorney and Solicitor for the Plaintiff-in-Error.

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Number 484.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1919.

POSTAL TELEGRAPH CABLE COMPANY, PLAINTIFF IN ERROR,

v.

THE CITY OF FREMONT, NEBRASKA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This action was commenced in a justice court in Dodge County, Nebraska, by the City of Fremont, Nebraska, to recover of the Postal Telegraph-Cable Company an occupation tax due from it for the years April 1915, to April 1916, and April 1916, to April 1917, at the ordinance rate of $60.00 per annum. The city had judgment; on appeal by the defendant to the District Court a verdict was directed in favor of the City and the Company appealed to the Supreme Court of Nebraska, which affirmed the judgment; and defendant now appears in this Court by writ of

error. The opinion of the Supreme Court of Nebraska appears at pages 97, 98, 99 of the record.

The tax was provided by a general ordinance of the City of Fremont, enacted prior to the year 1894, and prior to the defendants commencing business in Fremont, and which ordinance is copied in full at pages 33 to 37 of Record, and by which an annual tax for revenue purposes was levied on various lines of business, including $60 per annum on telegraph and telephone companies receiving and dispatching intrastate messages within the city.

The City is authorized by the statutes of the state of Nebraska "to by ordinance raise revenue by levying and collecting a license or occupation tax" (Revised Statutes of Nebraska, 1913, Sec. 4818, 4821).

Prior to the year 1903, the Western Union Telegraph Company had a monopoly of the telegraph business in the city of Fremont (Record, p. 76), and was then paying and has continued to pay this tax; during that year the defendant Postal Telegraph-Cable Company applied to the mayor and council of the City of Fremont for a franchise to occupy its streets and alleys and conduct within the city a competitive telegraph business. A franchise for 25 years was granted.

This franchise and the ordinance under which granted are set out on pages 42 to 46 of the Record.

Without this grant the Postal Company had no authority to occupy the City's streets.

At the time the Postal Company received its franchise to do business in and occupy the streets of the city the occupation tax ordinance was in force and had been for ten years and the Company applied for its franchise with reference to this ordinance. The Company then well knew of said annual tax, and of the fact that it had theretofore been specifi-

cally upheld in *Western Union Telegraph Co.* v. *City of Fremont*, 39 Neb. 692; and *Western Union Telegraph Co.* v. *City of Fremont*, 43 Neb. 499.

The Company in 1903 commenced and thereafter continued business under said franchise and paid the tax without objection for six years and then ceased paying about the year 1910, claiming that the tax was unreasonable and invalid *as to it*. It paid the tax, however, for 1914 (it claims through oversight). The volume of business the Company enjoyed from 1903 to 1914 does not appear.

The defendant by its pleading and evidence tried and has since presented the case wholly on the theory that the ordinance is void *as applied to the defendant;* and has made the business of the defendant the test of the validity of the ordinance rather than the telegraph business generally as carried on within the city of Fremont.

In 1913 the Legislature of Nebraska passed an act with reference to telegraph rates (Sec. 7408, Revised Statutes of Nebraska, 1913) which appellant contends requires it to do an intrastate business. This act was passed after appellant had been doing an intrastate business at Fremont for ten years, and several years after appellant had ceased paying its tax; and is only recently relied on by it, and can have no material bearing.

Appellant advances but two general propositions (page 9, its brief) to-wit, that the tax is invalid:

1. Because the receipts (the Postal's) from compelled intrastate business are not sufficient to pay the tax, and it therefore falls upon interstate commerce.

2. Because the Company is required by the ordinance of Fremont (taken in conjunction with the statutes of Nebraska) to pay this tax as a condition upon its interstate business.

ARGUMENT AND AUTHORITIES.

I.

The ordinance is valid; the tax is reasonable; and is not one levied on interstate commerce; the Postal Company's receipts are not determinative of the reasonableness or unreasonableness of the ordinance; the Postal Company should be estopped to question the tax; the act of the Legislature of 1913 does not render the tax void, nor have the effect contended for by appellant.

It would seem that such of the propositions advanced by appellant in its brief has been clearly decided adversely to it by this Court and others and in most of which cases appellant was a party.

We submit:

1. "A city, so authorized by the state, may, as against federal constitutional limitations of power, impose on a telegraph company a license tax, restricted to right to do business within it, where the tax does not burden, or discriminate against interstate business, and the local business is so substantial that it does not clearly appear the tax is a disguised attempt to tax interstate commerce; such tax not being an inspection measure, limited in amount to cost of issuing license or supervising the business, but being an exercise of the police power of the state for revenue purposes, restricted to internal commerce, and therefore within the state's taxing power" (Syllabus of *Postal Telegraph Cable* v. *City of Richmond*, 249 U. S. 252, 39 Sup. Ct. Rep. 265).

2. The City of Fremont had authority by its charter to impose by ordinance an occupation or license tax on the intrastate business of telegraph companies done within the city.

Revised Statutes of Nebraska, 1913, Secs. 4818, 4821.
City of Grand Island v. *Postal Telegraph & Cable Co.*, 92 Neb. 253, 138 N W. 169.

Western Union Telegraph Co. v. *City of Fremont*, 43 Neb. 499.

Postal-Telegraph Cable Co. v. *Charleston*, 153 U. S. 692.

3. Under the tax ordinance intrastate and government service are expressly excluded from liability for the charge and the tax is valid.

Postal Telegraph Cable Company v. *City of Richmond*, 249 U. S. 252, and cases cited.

4. The language of the ordinance is almost identical with those upheld by this Court, and the pertinent parts are as follows (pp. 34-6, Record):

"Levied.—That there is hereby levied a license tax on each and every occupation and business within the limits of this city, in this section enumerated to raise revenue thereby in the several different sums on the several different businesses and occupations respectively as follows:

"Telegraph Offices.—The sum of sixty dollars per year on the business and occupation of receiving messages in this city from persons in this city and transmitting the same by telegraph from this city within this state to persons and places within this state, and receiving in this city messages by telegraph transmitted within this state from persons and places within this state to persons within this city and delivering the same to persons in this city, excepting the receipt, transmission and delivery of such messages to and from any department, agency or agent of the United States, and excepting the receipt, transmission and delivery of any such messages which are interstate commerce; the business and occupation of receiving, transmitting and delivering of the messages herein excepted is not taxed hereby.

"Excluded Interstate Business.—The license tax by this article levied is not levied upon any business or occupation which is interstate, or which is done or conducted by any department of the government of the United States or of this state in the course of his official duties, or by any county or any subdivision of this state, or its officers as such."

5. The tax is prima facie reasonable and the reasonableness or unreasonableness of a tax cannot be determined by the extent of the business of a single company. (See cases hereinafter cited and set forth at length.)

The defendant submits its own receipts and disbursements for two years as a test of the reasonableness of the ordinance and rests its entire case on that theory. The city submits that the validity of the ordinance is to be tested by its reasonableness as applied to a class as distinguished from its reasonableness as applied to one of the class. No occupation tax ordinance could be upheld if the defendant's contention is correct. An ordinance cannot be valid as to one of a class and invalid as to another. If this ordinance is void as to the Postal Telegraph-Cable Company, it is void as to others engaged in like business.

This brief will not therefore discuss in detail the defendant's evidence of its own receipts and disbursements. Nor the arbitrary theoretical apportionment of expense. This case does not rest on either.

Nor is it correct as stated by the appellant that the Supreme Court of Nebraska based its construction of the ordinance on the findings of fact as to the intrastate receipts of appellant.

This is a general occupation tax ordinance levying varying taxes on a multitude of businesses in the city of Fremont and if the defendant's contention is to prevail, any member of any class doing an unprofitable business could attack the ordinance applicable to his class and thereby have the ordinance declared invalid as to the class.

The statutes governing cities of the Fremont class authorize the levying of occupation taxes for the purpose of raising revenue and this ordinance copied in full in the transcript purports to be and is by its terms a revenue ordinance.

Defendant offered no evidence to show the volume of business available in the City of Fremont, nor what proportion of

the business it did nor the conditions under which it operated its business; nor what facilities it had for doing its proportion of the business; nor whether it had made any substantial attempt to do a local business. The only evidence having a bearing in that connection is its evidence that it had nineteen offices in the state of Nebraska, doing intrastate business while its competitor, the Western Union Telegraph Company had 632 offices (page 76, Record). Intrastate telegraph business being business interchanged between local offices within the state of Nebraska, it is of course, manifest that the Postal Telegraph Company operating an intrastate business in the City of Fremont and having only nineteen points to which it could transmit telegrams, could not compete with the Western Union Telegraph Company having 632 offices to which it could transmit local telegrams; in fact the Postal Telegraph Company by its absence of connecting offices rendered it impractical for it to conduct an intrastate business. If it had only nineteen offices and the Western Union Telegraph Company had 632, its business would not even be the ratio of 19 to 632, because citizens who attempted to patronize it would, on first inquiry, learn that it had no general service to give and would not thereafter patronize it even to those few points to which it could give service; there being thirty chances to one that its competitor, the Western Union would have the service that the citizens desired.

This tax cannot be valid as to the Western Union and invalid as to the Postal Telegraph Company. No occupation tax can be subjected to that test, no city can have a tax on a business that is valid as to one person engaged in the business and invalid as to another.

It is common knowledge that a large percentage of all businesses ultimately fail through bad management, incapacity, lack of capital and a multitude of other causes. No occupation tax can be tested and its reasonableness determined by the success or failure of a specific business venture. It

must, of necessity, be tested by the general business of the particular kind in the city and as applied to all persons engaged in business of that class.

The defendant failed to plead and prove facts in that connection.

An occupation tax is payable in advance, and bears a reasonable ratio to the business of the class in the community. A new man in business paying it pays with reference to a business yet undone,—as the Postal did when it opened up business in Fremont. Can it be said that the city must wait to collect the tax to ascertain whether the particular venture falling within a class will be profitable or not?

The tax that became due in advance from the Postal Company each year was not based on what business it had done during the preceding year or what it might do in the tax year to ensue

In fact at the time this suit was filed the tax for the year April, 1916, to April, 1917, was due but the year had not fully run.

The defendant views this tax as a purely "license tax," as distinguished from what it is in fact, "a tax for revenue."

An element in an occupation tax for revenue may be the character of the business and the franchise element, and while appellant dwells at length on the space it occupies in the city's alleys and streets and minimizes that feature, still it appears from the evidence (page 88), that the wires of this company run for four blocks through the heart of the business district of the city and in a ten foot alley where there are [illegible] open telephone, electric light and telegraph wires, and while the appellant suggests that it only has seven poles, it omits to state that for the balance of the distance it uses the poles of the telephone and electric companies. A

mere statement of this situation will make it manifest that if the tax was one based on supervision and franchise use of the streets and alleys, that the amount is not excessive.

The sum of $60 per year on this business operated in a city of 8000 is not on its face unreasonable. The Court will presume a tax to be reasonable and valid.

McQuillan's Mun. Ord. Sec. 417 and cases cited.

So far as the records show, the defendant may have done a satisfactory business in Fremont for the ten years prior to the year 1913. It takes its intrastate receipts for the year 1914 and 1915 and reasons that because the same were insufficient to pay its expenses that therefore the deficit was necessarily paid out of its interstate receipts; and therefore the tax is void. It appears from the figures submitted by the defendant (pp. 78, 79, Record) that the interstate receipts were inadequate to pay the interstate expenses. There were no interstate receipts to apply on intrastate expenses; in fact, it appears that each, the interstate and intrastate business was conducted at a loss, independent of the tax.

The treasurer of the company testified that the interstate receipts at Fremont for the year 1914 were $732.06 (p. 78, Rec.) and the expenses properly apportionable to interstate business, were $1121.58 (p. 80, Rec.); and interstate receipts for the year 1915, were $733.76 (p. 78, Rec.), and expenses properly apportionable to interstate business, $1186.59 (p. 80, Record).

Presumptively the tax is a reasonable one as applied to the business generally within the city. Appellee was ready to meet any proof to the contrary but none was offered. Appellee showed its own receipts and disbursements only; it hardly needs even the citation of the cases hereinafter to indicate the unreasonableness of a theory that the business done by one of a class could govern and regulate the tax for

the entire class. For reasons entirely within its own control the one might do practically no business, while the business generally in the city was large and the tax reasonable. In fact that is true of the telegraph business in Fremont.

The Supreme Court of Nebraska in affirming the judgment of the lower court, held (syllabus, p. 96, Record):

"1. Where a proper basis for classification exists, a tax imposed upon all persons or companies engaged in a certain occupation does not deny the equal protection of the law guaranteed by the fourteenth amendment.

"2. The reasonableness of a tax does not depend upon whether or not a hardship may be worked in an isolated case but upon the general operation of the tax in the class to which it applies.

"3. In imposing an occupation tax for revenue purposes upon a telegraph company doing an intrastate business a city is not limited to the mere rental value of the city's property occupied by defendant's poles and wires and the expenses arising from their supervision, but the extent of the tax is a matter for the judgment and discretion of the municipal government, subject only to the restriction that it must not be prohibitory.

"4. Mere proof of loss in operation for a period of two years by an individual telegraph company without showing what the volume of business available in the municipality is, or what portion thereof is done by such company, or what facilities it has for handling the business offered, is insufficient to show that an annual occupation tax of $60 imposed for revenue purposes on the privilege of doing an intrastate business in a city of over 8,000 inhabitants is unreasonable.

"5. In imposing an occupation tax for revenue purposes a municipality acts as the agent of the state and where such tax is imposed on a telegraph company doing both an intrastate and an interstate business any deficit arising from the payment of a tax on the privilege of doing an intrastate business within the municipality be-

comes a charge on the revenue such company obtains from its intrastate business as a whole and the tax does not become a burden upon the company's interstate business merely because the amount imposed by the municipality is greater than the company's net receipts in that municipality for intrastate business.

"6. The tax imposed held not to be a charge on interstate commerce."

In the *City of Grand Island* v. *Postal Telegraph-Cable Co.*, 92 Neb. 253, the Supreme Court of Nebraska said:

"The city clearly had the power to tax the business in question. The tax was uniform, in that it operated alike on all persons or corporations engaged in that business, and we are not aware of any case which holds that when the business transacted by one person or corporation of a class has proven largely remunerative, and the business of another of the same class was less remunerative, or was in fact conducted at a loss, a court of justice can for that reason declare an occupation tax ordinance void. We think no court should say as a matter of law that an occupation tax of $40 per year upon each and every telegraph company doing business within the limits of the city of Grand Island is as a matter of law manifestly unreasonable and confiscatory. It may be said that the charge is prima facie reasonable. (*Western Union Telegraph Co.* v. *Borough of New Hope*, 187 U. S., 419, 23 Sup. Ct. 204, 47 L. Ed. 240.) The amount of an occupation tax is not to be measured by the profits of the business, but should be considered as one incident to local self-government—to supervision, to the expense incident to the issuing of the license, to the probable expense of inspection, regulation and such police surveillance as the municipal authorities can lawfully give to the location, erection and maintenance of poles and wires as provided by ordinance. In the absence of evidence which clearly shows that the license charge, in general effect, is such as to make it confiscatory, the ordinance must be upheld."

In the case of *Nashville, C & St. L. R. Co.* v. *Attalia*, 118 Ala. 362, 368, 24 So. 450, 452, the court recognized the propo-

sition that a license tax levied by a city under authority of law must be reasonable, but held that

> "the reasonableness or unreasonableness of a license tax cannot be determined by the extent of the business of a single individual. There may be competition, or negligence on his part, or other considerations affecting the extent of the business of complainant."

In *Mayor, etc., of Savannah* v. *Cooper,* 131 Ga. 676, 63 S. E. 141, the Court said:

> "A city tax on an occupation must be reasonable with reference to such vocation. This does not mean that it must be adjusted to the amount of business of each individual, or limited exclusively by the receipts of some particular individual; but, considering that business within the municipality as a whole, the tax must be reasonable, and not arbitrarily discriminatory. To illustrate, a tax on retail clothing merchants would not necessarily be held void at the instance of one merchant by showing that he did a very small business, and that the tax fell heavily upon him. If the individual business were small enough, it might be difficult to pay any tax. But this would not suffice to upset an ordinance imposing a reasonable and fairly adjusted tax upon such an occupation."

In *Atlantic Postal Telegraph-Cable Co.* v. *City of Savannah,* 136 Ga. 657, 71 S. E. 1115, the Court held:

> "Where an attack is made on the reasonableness of an ordinance because of certain extrinsic facts, the burden is on the party attacking the ordinance to prove such facts, and upon his failure to carry this burden the ordinance will not be declared invalid. In this case the plaintiff failed to carry the burden of proof."

And in the opinion said:

> "The isolated fact that the business of the plaintiff was conducted at a loss does not make the tax excessive. An occupation tax only becomes unreasonable when applied to the municipality as a whole. (*Mayor etc., of Savannah* v. *Cooper,* 131 Ga. 676, 63 S. E. 138.) The burden

was on the plaintiff to show the unreasonableness of the tax, and it failed to submit evidence sufficient to overcome the presumption in favor of the reasonableness of the ordinance."

Nor did the evidence in the case at bar show that the receipts of the Postal Company for two years offered in evidence were a proper criterion of business in the City of Fremont.

In *City of Troy* v. *Western Union Telegraph Co.*, 164 Ala. 482, 51 So. 523, 27 L. R. A. (N. S.) 627, the Court held:

"License tax of $100.00 for revenue exacted by a municipal corporation from a telegraph company doing an intrastate business therein is not unreasonable as to a particular company merely because that branch of its business is conducted at a loss for the year for which the tax is levied."

And in the opinion the court says:

"While the business of 1908 shows that the Telegraph Company at Troy was run at a loss, insofar as intrastate business is concerned, yet it is not shown that such is a proper criterion as to the business of a Telegraph Company from year to year in that city."

Further illustrative of this is *Postal Telegraph-Cable Co.* v. *City of Cordele,* 141 Ga. 658, 82 S. E. 26. In that case the court expressly makes the distinction plaintiff points out. In this Georgia case evidence of the entire telegraph business of the city was in evidence; and the court distinguishes the case from those where only the defendant company's receipts and disbursements appear. And in the opinion says:

"We recognize the rule that municipal councils have large discretion in regard to what is a reasonable occupation tax, and that their determination will not be declared unreasonable by the courts unless it is clearly so. They are not obliged in each case to make an occupation tax a graded one though they may make reasonable classifications, resting on some legitimate basis. It is

not necessary to measure a business tax according to the receipts of the smallest among a number of dealers engaged in that kind of business; but the particular business within the municipality as a whole should be considered, and the conditions affecting it. (*Mayor and Aldermen of Savannah* v. *Cooper*, 131 Ga. 670, 676, 63 S. E. 138.) The statement in the headnote case of *Southern Express Co.* v. *Ty Ty*, 141 Ga. 421, 81 S. E. 114, seems to go further than we need go in this case, and does not discuss the conditions to be considered in declaring a municipal tax unreasonable and void. In *City of Troy* v. *Western Union Telegraph Co.*, 164 Ala. 482, 51 South, 523, 27 L. R. A. (N. S.) 627, it was held that a license tax of $100 for revenue, exacted by a municipal corporation from a telephone company doing an intrastate business therein, was not shown to be unreasonable and void as to a particular company merely because that branch of its business was conducted at a loss for the year for which the tax was levied. A similar ruling was made in *Williams* v. *City of Talladega*, 164 Ala. 633, 51 South, 330, decided on the same day. In each of these cases the limitation on the municipal power to impose a license tax was recognized, but it was held that the fact mentioned was not alone sufficient to show an abuse of the power or of the discretion of the municipal council in its exercise. Similarly see *Atlantic Postal Telegraph-Cable Co.* v. *Mayor and Aldermen of Savannah*, 136 Ga. 657, 71 S. E. 1115. The present case does not rest on that fact alone, but upon that and others."

As stated the matter of supervision and franchise may be an element in fixing an occupation tax, and that element of itself would justify a tax of the amount levied by this ordinance.

In *Chester City* v. *Western Union Telegraph Company*, 154 Pa. 464, 25 Atl. 1134, the Telegraph Company averred that the license fee was at least five times the amount of the necessary expenses, but the court declared that the reasonableness of the charge was to be measured by the liability of the city for injuries caused by defective poles and wires,

as well as by the amount of actual expense for the issuing of licenses, and other expenses thereby imposed upon the municipality, and that it was a mistake to measure the reasonableness of the charge by the amount actually expended therefor by the city for a particular year.

And it has been held that the fact that such charge was more than ten times the cost of regulation and of all outstanding expenses, including liability for damages, loss, and expenses of every nature, is not sufficient to defeat the right to collect the tax.

Philadelphia v. *American Union Telegraph Co.*, 167 Pa. 406, 31 Atl. 628.

And it was so held where it was alleged that the charges were thirteen times more than a sum sufficient to defray all expenses and charges of inspection and supervision.

North Braddock v. *Central Dist. & Printing Telegraph Co.*, 11 Pa. Super. Ct. 24.

In the *City of Burlington* v. *Unterkircher*, 99 Iowa 401, 68 N. W. 796, the matter of the validity of a license fee was involved and the court said the fee is usually and necessarily fixed before the term for which the license is given commences, when the exact cost of supervising the business and enforcing the regulations which are to control it cannot be foretold. The cost may be variable, fluctuating under different and unforeseen conditions. It may be greater for the same term in some cases than in others, and, at best, can only be approximated. A reasonable discretion in fixing it must be allowed, and, when that has been exercised, the result reached is final and conclusive so long as the conditions remain substantially unchanged. To permit a person subject to a license fee to question and refuse to pay it, on the ground that during a particular time the cost of the license and the expense of supervising and regulating the business for which it was issued were less than the fee charged, would subject the mu-

nicipality to harrassing annoyances and delays, and would greatly impede the exercise of its proper functions. The reasonableness of an ordinance is usually, if not always, a question for the court, and not for the jury, to determine.

Meyers v. *Railroad Co.*, 57 Iowa 558, 10 N. W. 896.
1 Dill Mun. Corp., p. 261.

As stated the testimony offered by the Company was as to its own receipts, accompanied by a formula devised by an officer of the Company for apportioning them among intrastate and interstate business.

In connection with such testing the language of this Court in *Postal Telegraph-Cable Co.* v. *City of Richmond, infra,* is particularly pertinent:

> "The contention cannot be allowed that the ordinance is shown to be void by a formula, devised by an officer of the appellant and pressed upon our attention, for determining the division of costs and expenses between interstate and intrastate business, which it is claimed shows that the pole tax must be paid wholly from receipts from interstate business.
>
> "Regardless of obvious criticisms which might be advanced to this formula and to the inadequacy of the data furnished by the record for testing its validity, the charge imposed upon the company, as we have seen, was so moderate in amount, having regard to the necessary burdens which the poles and wires in the streets must impose upon the city and is so well within the prior holdings of this Court, which we have cited, that it cannot be accepted as a sufficient basis for declaring the ordinance invalid.
>
> "There is no disposition on the part of this Court to modify in the least the law as it has been stated in many cases, that 'neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate any more than it can be imposed upon foreign commerce; and that all acts of legislation

producing any such result, are * * * unconstitutional and void.' *Crutcher* v. *Kentucky*, 141 U. S. 47, 62, 11 Sup. Ct. 851, 855 (35 L. Ed. 649); *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355. But municipal ordinances, which for constitutional inquiry are deemed state laws, will be declared void only where clearly shown to be unconstitutional, and this very certainty cannot be said of the ordinances in this case, assailed, as they are, upon inadequate evidence and upon purely empirical calculations which we are asked to adopt."

That an occupation tax is not unconstitutional because the company is also engaged in interstate business and has accepted the provisions of the act of congress of July, 1866, relative to post rates is no longer an open question.

Postal, etc. Co. v. *Charleston*, 153 U. S. 692.
Postal, etc. Co. v. *Baltimore*, 24 L. R. A. (Ind.) 161.
Western Union v. *City of Fremont*, 43 Neb. 499.

We have not discussed the cases cited by appellant laying down general principles for this case is controlled by the facts; and the facts in the cases cited are not analagous.

II.

The Act of 1913.

The contention is made that defendant was compelled by statute to do an intrastate business at Fremont, and that the payment of the tax if compelled must be made from the interstate receipts.

There are three answers to this argument:

1. The section quoted (Sec. 7408) is a rate fixing section applicable to intrastate messages. The act is entitled "an act to fix a maximum rate of charge for the transmission of telegrams by telegraph companies in the State of Nebraska"; it provides a flat charge of 25 cents for 10 words. But Sec. 7409, which is a part of the act, provides:

"The state railway commission of Nebraska shall have the power to hear and determine whether or not the rate or charges provided by the next preceding section are so low as to be non-remunerative or unjust to said telegraph company, and upon complaint in writing on the part of any telegraph company affected thereby, said railway commission, upon trial and a full hearing thereon, after notice thereof, shall either raise or lower the rate therein fixed or allow it to remain as therein provided, to the end that the same shall be just and reasonable to all parties concerned; and the rate therein provided shall remain in force and effect until after said state railway commission shall have provided a greater or less rate than the rate therein fixed."

So if the act is susceptible to the construction that every telegraph company must do an intrastate business it contemplates that the intrastate business shall be self-supporting, and provides a remedy for obtaining adequate rates.

Further if the act requires the doing of an intrastate business at points where it is impracticable and unremunerative to do so, as a condition of doing an interstate business from that point, it would seem that it would be such act that is void as imposing a burden on interstate business, and that one of the items of expense at the local point like local taxation, could not be considered as the burden. In doing an intrastate business at Fremont the Company had other items of expense in doing its intrastate business beside this local taxation, and all were items of expense on that business, and if it was impracticable for it to do an intrastate business and pay the reasonable expenses incident to that business, including a reasonable local occupation tax, like others in similar business, it had the right to refrain from doing that intrastate business.

Osborne v. *Florida*, 164 U. S. 650, 33 Fla. 162, 39 A. S. R. 99.

City of Grand Island v. *Postal, etc. Co.*, 92 Neb. 257.

Pullman Co. v. *Adams*, 189 U. S. 420.

The evidence shows that the Company had a deficit at Fremont for 1915 and 1916 in each its interstate and its intrastate business, and independent of this tax, so neither business was a burden on the other.

As pointed out the Company commenced business at Fremont after the ordinance was enacted and paid this tax for years before this act of 1913 was passed.

Again we think a reasonable construction of this act of 1913 is that it legislates with reference to points where the Company elects to do an intrastate business. If that is not the construction then every expense in doing a compulsory unremunerative intrastate business would be a burden on interstate commerce and the act requiring it be void.

The Supreme Court of Nebraska has not construed the act of 1913 as imposing an obligation on a telegraph company to do an unremunerative intrastate business as a condition of doing an interstate business; and this court should not anticipate that such interpretation will be attempted. (*Pullman Co. v. Adams*, 189 U. S. 420, where an analagous question was presented.) If the Supreme Court of Nebraska should give it that construction it then might be for this Court to say in a proper case whether the act or the tax ordinance or both were void (*Pullman Co. v. Adams*). But even in such a case this Court would have to have before it in connection with the ordinance evidence of its unreasonableness as applied to a class, as distinguished from one of the class.

For the reasons hereinbefore pointed out the tax was not paid from interstate receipts, and the opinion of this court on a similar contention in the City of Richmond case, is pertinent, where the Court said:

> "A careful examination of the record fails to convince us that it contains that clear and convincing evidence that the tax thus falls upon interstate commerce which

is necessary to justify a finding that the tax is unconstitutional and void."

In conclusion we beg to again call the Court's attention to the fact that this tax has been in operation unchanged for more than twenty-six years, and is manifestly a very reasonable tax; that the appellant obtained its franchise rights while this tax was in force and with reference to it; and paid the tax for a term of years; that the fact that defendant's business—both intrastate and interstate—proved unremunerative for two years affords no basis for declaring an occupation tax void as to it and all others in the same class.

We submit that the ordinance tax is not shown to be unconstitutional.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 156.—October Term, 1920.

Postal Telegraph-Cable Company, Plaintiff in Error, *vs.* The City of Fremont. } In Error to the Supreme Court of the State of Nebraska.

[February 28, 1921.]

Mr. Justice McKenna delivered the opinion of the Court.

The City of Fremont is a city of Nebraska of the first class, having more than 5,000 and less than 25,000 inhabitants. By an ordinance duly enacted in 1903 and re-enacted in 1907, there was levied a license tax upon businesses and occupations within the city including telegraph offices. Upon these offices it levied a tax of $60.00 per year on the business and occupation of receiving and sending messages from the city to any place in the State, and receiving messages transmitted from any place in the State to the city, except messages received from or transmitted to any department, agency or agent of the United States, and except messages which were interstate commerce.

Plaintiff in error, herein called the Postal Company, is a corporation engaged in such business within the city, it having been in December, 1881, permitted by the constituted authorities of the city, in the manner provided by its ordinance to occupy and use the streets of the city for that purpose, the ordinance providing that it was "subject to such regulations as have been or may be provided by ordinance", and that nothing in the article granting such consent to the use and occupation of the streets should "be construed to prevent said city from further regulating, licensing or taxing any person, company or corporation owning, using or operating any telephone or telegraph lines within the corporate limits of said city." The Postal Company in accordance with the ordinance paid a license tax of $60.00 a year for the years,

1903 to 1914, each inclusive, but did not pay for the years 1915 and 1916, and this action was brought for the recovery of the same with interest at 7%.

The defenses of the Postal Company set up in its answer are that it is compelled by the charter of its organization to do intrastate as well as interstate telegraphing, that it paid the license tax for the years alleged inadvertently and without recognition of its legality; that it has accepted the terms of the Post Road Act of July 24, 1866, and is entitled to its benefits; that the tax is confiscatory and prohibitive and deprives the company of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. In specification of this defense it is alleged that the receipts of the company for 1914 on its intrastate business were only $108.28, and for the year 1915, $83.96, and that the expenses properly chargeable against these years respectively, exclusive of the tax, were $185.56 and $154.26, and that its loss on intrastate business would have to be made up from interstate business; that the city is under no expense by reason of the poles and wires of the company being in the city, and that $60.00 a year is in excess of a rental charge upon them and that the streets are post roads within the meaning of the Post Road Act of 1866. In further defense the answer alleges that the tax is one on interstate commerce; that it deprives the company of the equal protection of the laws and impairs the obligation of a contract, both in violation of the Constitution of the United States.

The case was tried to a jury, which, after evidence taken, was instructed by the court to return a verdict for the city in the sum of $135.00.

A motion for new trial was denied and judgment was rendered upon the verdict. It was affirmed by the Supreme Court of the State, the Supreme Court deciding: (1) the tax was "not a mere license or regulation measure but one designed for revenue purposes" and that its extent was "a matter for the municipal government subject only to the restriction that it must not be prohibitory." Citing Cooley on Taxation, 3rd Ed., 1139, 1440. (2) The tax was not prohibitive; that proof of loss for two years without showing what volume of business was available in the municipality, or what portion was done by the company or what

its facilities were for handling the business, was not sufficient to show that a tax of $60.00 imposed for revenue purposes on the privilege of doing an intrastate business in a city of over 8000 inhabitants was unreasonable. (3) In imposing an occupation tax for revenue purposes a municipality acts as the agent of the State and where a tax imposed upon a telegraph company for the privilege of doing an intrastate and interstate business and the revenue derived from its intrastate business as a whole becomes insufficient and may become a burden on its interstate business "Section 7409, Rev. St., 1913 provides a remedy."

The only contention that the Postal Company makes here is that the tax "is in effect an imposition upon its interstate business." It has this effect, is the assertion, because its "intrastate business at Fremont is insufficient to pay the tax" which if compelled, must be paid from the company's interstate business", because it is required to do an intrastate business by Section 7408 of the state statutes and its charges are prescribed by the section. For the contention and its supporting assertions the company relies on *Postal Telegraph-Cable Co.* v. *City of Richmond*, 249 U. S. 252.

We cannot assign to that case the determining force that counsel attribute to it. The case clearly declares that a license tax may be lawfully imposed on a telegraph company for the right to do business within the borders of the municipalities of a State. The power, of course, has its limitations and must be exercised with due relation to the company's interstate business. That relation is always to be considered but it is not disposed of by the simple assertion of a loss. The cause of it or the condition of it is to be considered. In this case the tax is $60.00 a year. It certainly cannot be said that it is repellant from its amount, and there is no pretense that its imposition "is a disguised attempt to tax interstate commerce." The Postal Company when it entered the city, the ordinance levying the tax then being in existence, did not declare against its legality or complain of its detrimental operation. Indeed, for the privilege of entering the city it subjected itself to further regulation, licensing and taxing. And it paid the tax from that time until 1914. The allegation in its answer that it paid the tax "through the mistake and inadvertance of" its "clerical force" we are not disposed to accept, without more, as an explanation.

Williams

The Supreme Court expressed the view that mere proof of loss for two years, which may have been exceptional, determined nothing in the absence of a showing what business was available to the company or what facilities it had or used, and also held that the city being an agent of the State any deficit arising from the tax imposed on the intrastate business of the company can be prevented from becoming a burden upon the company's interstate business by an application to the State Railway Commission under the provisions of Section 7409 for an increase of its intrastate rates. And the suggestion is pertinent. The company, as we have seen, cites Section 7408 as a compulsion upon it to engage in intrastate business and at designated rates. From the rigor of the requirement Section 7409 provides a mode of relief and until it is denied the company cannot complain under the circumstances presented by this record. In other words, if Section 7408 is imperative upon the company to continue intrastate business, Section 7409 affords a means of obtaining relief from burdensome obedience. The sections are counterparts. If submission to Section 7408 results in insufficient revenue and a burden upon interstate commerce it is made the duty of the Railway Commission by Section 7409 upon complaint of the Postal Company to raise the intrastate rate "fixed" in Section 7408. No attempt to secure relief under Section 7409 appears to have been made.

Judgment affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.